82-1169

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CPC INTERNATIONAL INC.,

Petitioner

v.

DIMMITT AGRI INDUSTRIES, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a court of appeals have the power under 28 U.S.C. § 2106 to order a new trial of a jury finding that no party has appealed and that the court need not examine in order to dispose of a separate jury finding before it on appeal?

2. Should this Court resolve the clear conflict between the decision of the court below and decisions of this Court holding that the Seventh Amendment right to a jury trial precludes an order of a new trial based on a supposed conflict in jury findings that can readily be reconciled?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the court of appeals below is reported at 679 F.2d 516 and is reprinted as Appendix A. The opinion of the court of appeals denying rehearing en banc is reprinted as Appendix C.

JURISDICTION

The decision of the court of appeals was entered on July 2, 1982. A timely suggestion for rehearing en banc was denied by order of October 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

(emphasis added)

2. The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner (defendant below), CPC International Inc. ("CPC"), is engaged in the business of corn wet milling, which consists of producing and selling cornstarch, corn syrup, and other products derived from corn as a raw material. In 1974, Respondent (plaintiff below), Dimmitt Agri Industries, Inc. ("Dimmitt"), sued CPC and eight other corn wet millers,[1] alleging that in 1971 and 1972, defendants had lowered their prices in order to drive Dimmitt, a new entrant, out of business. Dimmitt sought jurisdiction under 15 U.S.C. § 15 and alleged five different antitrust offenses: (1) a price fixing conspiracy under Section

[1] All of the defendants except CPC settled before trial.

1 of the Sherman Act;[2] (2) conspiracy to monopolize, (3) attempt to monopolize, and (4) monopolization, all under Section 2 of the Sherman Act;[3] and (5) price discrimination under the Robinson-Patman Act.[4]

During the seven-week trial of this lawsuit, Dimmitt and CPC offered the jury two dramatically different views of events in the corn wet milling industry during 1971 and 1972. *See* 679 F.2d at 522-25. With respect to its charges of monopolization and attempt to monopolize, Dimmitt presented evidence, primarily through CPC's internal memoranda, which allegedly showed that CPC had lowered its list prices for cornstarch and corn syrup in order to stabilize price levels, to discourage other competitors from entering or expanding, and specifically to eliminate Dimmitt from the market. *Id.* at 522-24. CPC, on the other hand, provided evidence that increased production in the industry had caused a substantial excess of supply over demand for cornstarch and corn syrup, that the excessive supply along with other market factors beyond the control of CPC had led to a severe price war during 1971 and 1972, and that CPC had adopted a defensive strategy of reducing prices to meet competitive offers in order to prevent further erosion of its market shares and indeed to assure its survival in the industry. *Id* at 524-25.[5] Thus, in order to answer interrogatories concerning Dimmitt's antitrust charges, particularly the monopolization and attempt to monopolize counts, the jury had to resolve the basic dispute between the parties concerning CPC's posture and motives in lowering its prices for cornstarch and corn syrup.

After both parties had rested, the trial court, over CPC's objection, submitted the case to the jury on all of the above

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[2] 15 U.S.C. § 1.

[3] 15 U.S.C. § 2.

[4] 15 U.S.C. § 13.

[5] *See* Brief of Appellant at 3-10.

five theories. The jury returned a verdict consisting of special interrogatory answers in CPC's favor on all claims except monopolization, and on that issue the jury found that CPC had monopolized the national markets for cornstarch and corn syrup.[6] The jury further found that Dimmitt had been injured by CPC's antitrust violation in the amount of $1,500,000.

CPC filed a timely motion for judgment nothwithstanding the verdict with respect to the monopolization finding on the ground that CPC, as a matter of law, did not possess monopoly power during the relevant time period of 1971 and 1972. Dimmitt did not challenge the jury's findings in any respect and moved for judgment on the verdict. The trial court denied CPC's motion for judgment n. o. v. and entered judgment for Dimmitt in the amount of $5,300,000.00, representing treble damages of $4,500,000.00 plus attorneys' fees of $800,000. CPC appealed from the denial of its motion for judgment n. o. v.; Dimmitt did not cross appeal.

The undisputed evidence was that during 1971 and 1972, CPC's "maximum possible market shares were 25 percent and 17 percent for the national cornstarch and national corn syrup markets respectively." 679 F.2d at 528. Because of these low market shares and the absence of sufficient countervailing conduct evidence of control over prices, the Fifth Circuit Court of Appeals held that the trial court's judgment based on the jury's finding of monopolization must be reversed as a matter of law. 679 F.2d at 530-31. At that point, however, rather than rendering judgment for

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[6] The special interrogatories, along with the jury's answers, are quoted in the Fifth Circuit's opinion. *See* 679 F.2d at 519-20 n.2. While the monopolization interrogatory, No. II, did not specifically identify relevant markets, CPC assumes for purposes of this appeal that the jury found monopolization of both relevant markets alleged by Dimmitt.

CPC, the court of appeals went on to consider the jury's finding on the attempt to monopolize offense, even though Dimmitt had never challenged or appealed from this finding.

With respect to the first element of the attempt offense, the requirement of a specific intent to monopolize, the court found that the only possible view of the evidence was that CPC had acted with such specific intent in lowering its prices for cornstarch and corn syrup. *Id.* at 534. With respect to the requirement of a dangerous probability of success, the second element of the attempt to monopolize offense, the court felt that after finding that CPC possessed monopoly power for purposes of its answer to the monopolization interrogatory, the jury could not have also found that there was no dangerous probability of monopolization by CPC. *Id.* In sum, according to the court of appeals, "[t]he only conceivable explanation for the jury's verdict" was that its affirmative finding on the monopolization interrogatory made an affirmative finding of an attempt to monopolize "redundant and unnecessary." *Id.* Based on this supposedly unambiguous and indisputable conclusion, the court, *sua sponte,* reversed the attempt verdict and remanded it for a second trial, citing Fed. R. Civ. P. 50(d) as authority for this ruling. *Id.*

CPC submitted a suggestion for rehearing en banc to the Fifth Circuit, urging that Fed. R. Civ. P. 50(d) does not authorize a court of appeals to order a new trial of an unchallenged jury finding. In addition, CPC contended that because there was no irreconcilable conflict between the jury's findings on the monopolization and attempt to monopolize interrogatories, the court of appeals could not order a new trial of the attempt to monopolize finding without violating CPC's Seventh Amendment right to a jury trial. The Fifth Circuit denied the suggestion for rehearing en banc, and the present petition followed.

REASONS FOR GRANTING THE WRIT

I. In Ordering a New Trial of a Jury's Unchallenged Finding That Was Independent and Separate from the Only Finding on Appeal, the Fifth Circuit Has Exceeded the Authority of a Court of Appeals Under 28 U.S.C. § 2106.

United States courts of appeals derive their existence from Article III of the Constitution and possess only such jurisdiction as is conferred by statute.[7] 28 U.S.C. § 2106 provides that a court of appeals can rule only with respect to a judgment, decree, or order "lawfully brought before it for review." From a jurisdictional standpoint, this Court has never declared the limits imposed on courts of appeals in ordering new trials of jury findings that have not been appealed. This case presents an opportunity for the establishment of a basic rule that will prevent courts of appeals from abusing their power in reviewing non-appealed jury findings.

The fundamental statutory issue posed by this petition is one of appellate court power. The judgment that was "lawfully brought before [the court of appeals] for review" in this case was entered pursuant to a jury verdict that CPC was liable for the offense of monopolization; the other counts, including attempt to monopolize, were rejected by the jury and duly dismissed. The court of appeals reversed the monopolization verdict as a matter of law on the basis of CPC's lack of monopoly power. The question now presented is whether the court of appeals, having dismissed the monopolization count, had authority, on its own motion, to review, reverse, and remand the attempt count although (1) Dimmitt had not challenged the jury's negative finding

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[7] *See* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 110.01, at 47 (2d ed. 1982); 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, at 395 (1976).

on this count, (2) the district court had not seen fit to order a new trial of the attempt count on its own motion pursuant to Fed. R. Civ. P. 59(d), and (3) consideration of the attempt issue was not necessary to the Fifth Circuit's determination of the matter before it for review.

While this petition focuses on the power of an appellate court to reverse non-appealed jury findings on its own motion, the scope of matters properly before a court of appeals is ordinarily circumscribed by the obligation of litigants to preserve and appeal errors allegedly committed in the district court. One of the most basic and hallowed principles of appellate procedure is that a court of appeals will not consider alleged error with respect to a jury finding that has not been appealed. For example, when a defendant appeals concerning alleged error in connection with a jury finding based on one of a plaintiff's multiple legal theories, the plaintiff as appellee must cross appeal in order to assert error with respect to a finding on a separate and independent theory.[8] In *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924), Justice Brandeis provided the classic statement of the rules concerning the scope of an appellee's rights as follows:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a

[8] *See* 9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 204.11 [2] to [3], at 4-42 to 4-44 (2d ed. 1982); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure § 3950, at 367-68 (1977).

> cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

Id. at 435. Thus, an appellee must preserve error and file an appeal in order to have standing to seek modification or reversal, as opposed to an affirmance, of the district court's judgment.

In *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185 (1937), a surety sued a contractor for which it had issued a bond in connection with a construction contract. The surety alleged two separate theories of liability — exoneration and specific performance. The trial court held that the surety was entitled to exoneration, but not to specific performance, and entered judgment accordingly. *Id.* at 189. Only the contractor appealed. After rejecting the judgment based on exoneration, the court of appeals held in favor of the surety on a theory of specific performance. This Court granted certiorari "to fix the measure of relief available to a non-appealing suitor." *Id.* at 190.

After quoting the relevant language from *American Railway Express Co.*, Justice Cardozo declared that the rule of that case "is inveterate and certain." *Id.* at 191.[9] While recognizing that exoneration and specific performance are "not very different," this Court nevertheless held that specific performance could not be awarded because the appellee had not raised this issue on appeal. *Id.* at 193. The decree of the court of appeals was therefore reversed.[10]

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[9] A long line of decisions was cited in support of this proposition.

[10] In the context of a petition for certiorari, this Court reaffirmed the rule of *Morley Construction Co.* and *American Railway Express Co.* in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970).

The decision of the Fifth Circuit in this case is contrary to these well-settled rules governing the rights of an appellee. In asserting a power to act on its own which courts have denied to the non-appealing litigants themselves, the Fifth Circuit has aggrandized appellate powers with considerable potential for extending and even redirecting the course of a litigation. After holding as a matter of law that there was insufficient evidence to support the jury's affirmative finding of monopolization, the court refused to enter judgment for CPC and instead ordered a new trial of the totally independent negative finding on the attempt to monopolize count, which Dimmitt had not appealed. If appellate courts may intervene in this fashion, particularly with respect to multiple count verdicts, the final resolution of a lawsuit may become an ever-receding horizon.

The Fifth Circuit made no effort to justify this assertion of appellate prerogative other than to cite Fed. R. Civ. P. 50(d) as the source of its supposed authority to order a new trial on the attempt to monopolize count. 679 F.2d at 534. Rule 50(d) specifies the rights of an appellee when the trial court has denied a motion for judgment n. o. v. filed by the appellant. In this case, the Fifth Circuit's order of a new trial on the attempt finding was completely beyond the scope of the monopolization finding that formed the basis of CPC's motion for judgment n. o. v. While the last sentence of Rule 50(d) indicates that a court of appeals may order a new trial on its own motion, nothing in this language or the Advisory Committee's notes to Rule 50(d)[11] suggests that this power to require a new trial

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[11] *See* Appendix C (quoting a portion of these notes). In fact, the Advisory Committee's notes specifically state that "Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n. o. v. and any accompanying motion for a new trial are denied, since the problems have not

extends to a jury finding independent and separate from the finding as to which the motion for judgment n. o. v. was filed.[12] Moreover, Rule 50(d) cannot add to the scope of statutory authority granted by Congress to courts of appeals under 28 U.S.C. § 2106.

In short, CPC submits that an appellate court's power to adjudicate derives from the issues lawfully brought before it by the litigants. Accordingly, a court of appeals may not *sua sponte* reverse a jury finding that has not been appealed unless such action is unavoidably necessary to the court's determination of the matter on appeal. If, for example, a non-appealed jury finding was in conflict with an appealed finding that was being remanded for a new trial, the court of appeals might conclude that both

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been fully canvassed in the decisions and the procedure is in some respects still in a formative stage."

In *Weade v. Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949), cited in the Advisory Committee's notes, this Court held that the defendant could not be liable as a common carrier for failure to exercise the highest degree of care, but then remanded for consideration of whether a new trial should be ordered concerning the defendant's alleged negligence as a general agent. In ordering consideration of a new trial, the Court may well have been influenced by the fact that it had first declared on the very same day that a general agent like the defendant could not be liable as a common carrier. *Id.* at 805. In any event, *Weade* turned on the standard of care applicable to the defendant under one given set of facts rather than two separate offenses with different elements and different supporting facts. *See infra* pp. 11-15.

[12] Nor does Professor Moore's treatise, which is cited by the Fifth Circuit (679 F.2d at 534), provide support for the proposition that when an appellate court has reversed and rendered judgment on a properly appealed jury finding, Rule 50(d) authorizes the court to reverse and remand for retrial an independent finding as to which no appeal was filed. *See* 5A J. Moore & J. Lucas, Moore's Federal Practice ¶ 50.15 (2d ed. 1982).

In *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 329 (1967), this Court said in dictum that under Rule 50(d), "[i]f appellee presents no new trial issues in his brief or in a petition

claims must be remanded in order to provide a meaningful and comprehensive second trial. In this case, however, the monopolization finding was not remanded for a new trial and the Fifth Circuit did not need to rule on the attempt to monopolize finding in order to dispose of the issue raised on appeal by CPC concerning the monopolization finding.

Indeed, the sole basis of the Fifth Circuit's decision to order a new trial on the attempt to monopolize count is its conclusion that after finding CPC guilty of monopolization, the jury presumably felt that it would be "redundant and unnecessary" to find CPC also guilty of an attempt to monopolize. 679 F.2d at 534. In effect, the court is saying that if the jury had known that its monopolization finding would be rejected as a matter of law, it would surely have found CPC guilty of an attempt to monopolize. Thus, in order to justify its decision to reverse and remand the negative finding on the attempt to monopolize count, the court has necessarily determined that this finding is in irreconcilable conflict with the affirmative finding on the monopolization count. Even if the court were authorized to engage in this strained and speculative effort to link the monopolization and attempt to monopolize findings, its inference of an inherent conflict is fallacious because the elements of these two offenses are different and substantial evidence in the record independently supports the jury's negative finding on the attempt to monopolize charge.

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for rehearing, the court of appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case." Since *Neely* involved only one jury finding that had been appealed, however, this statement does not support the proposition that a court of appeals may rely on Rule 50(d) to order a new trial of an independent jury finding that has not been appealed.

A. Differences Between the Intent Requirements for the Monopolization and Attempt to Monopolize Offenses

As the jury in this case was clearly instructed, there are two fundamental differences between the intent elements of the monopolization and attempt to monopolize offenses under Section 2 of the Sherman Act, 15 U.S.C. § 2. *See* 679 F.2d at 531-32 n.17. First, the intent requirement for an attempt to monopolize is more stringent because the defendant must have acted with a *specific intent* to acquire monopoly power — the power to control prices or exclude competition in the relevant market.[13] For monopolization, on the other hand, all that is required is proof of a *general intent* to engage in conduct later determined to be anticompetitive because, in the words of Judge Learned Hand, "no monopolist monopolizes unconscious of what he is doing." *United States* v. *Alumnium Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945). Second, the intent requirement for an attempt to monopolize can be met only by evidence that the defendant was *seeking to acquire* monopoly power. 679 F.2d at 531-32 n.17. The intent element of monopolization, by contrast, can be satisfied by proof that the defendant willfully either *"obtained, or maintained,"* monopoly power. *Id.* (emphasis added).

While a detailed review of the evidence seems inappropriate in this application for certiorari, even the brief references to CPC's proof in the Fifth Circuit's opinion demonstrate that the jury could readily have concluded that CPC's intent was sufficient for monopolization, but not for an attempt to monopolize. *See, e.g.*, 679 F.2d at 524-25. Logically, if the jury concluded that CPC already had monopoly power for purposes of its monopolization finding, it would be reasonable also to decide that CPC was

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[13] *See* 679 F.2d at 531-33 & n.17; *United States v. Griffith*, 334 U.S. 100, 105-06 (1948); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905) (Holmes, J.); *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945).

not simultaneously attempting to acquire monopoly power. Furthermore, since the undisputed evidence was that CPC's market share goals were no higher than its actual market shares during 1971 and 1972,[14] the jury could reasonably have found that CPC was attempting to maintain its existing market power — and not to acquire additional power.

Dimmitt contended that CPC's predatory pricing practices demonstrated its specific intent to monopolize. More specifically, Dimmitt alleged that CPC had engaged in predatory pricing designed to increase its market shares and thereby to achieve monopoly power over sales of cornstarch and corn syrup. In response, CPC maintained that its pricing practices were competitive, directed toward defending its market shares — and not predatory. If the jury accepted CPC's contention that it had not engaged in predatory pricing, they could readily have concluded that CPC's conduct was sufficient to constitute monopolization, but not an attempt to monopolize. *See* 679 F.2d at 531-32 n.17.[15]

B. Differences Between the Power Requirements for the Monopolization and Attempt to Monopolize Offenses

The power elements of the monopolization and attempt to monopolize offenses are different: monopolization requires proof that the defendant actually possessed monopoly power, while an attempt to monopolize can occur even if there is only evidence of a dangerous probability that the defendant will succeed in acquiring monopoly power. It is conceivable that a party could be found liable for monopolization and attempt to monopolize in the same lawsuit. Because of the differences between the pow-

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[14] *See* 679 F.2d at 521, 527 n.9.

[15] *See* III P. Areeda & D. Turner, Antitrust Law ¶¶ 711, 829 (1978). The Fifth Circuit implicitly recognizes the weakness of Dimmitt's evidence on the predatory pricing issue. *See* 679 F.2d at 534 n.21.

er elements of these two offenses, however, the violations could not occur simultaneously; the attempt to monopolize would necessarily precede the monopolization. As the defendant's market share increased, it would move from posing a dangerous threat of acquiring monopoly power (an attempt to monopolize) to the actual possession of monopoly power (monopolization). In this case, however, it is undisputed that CPC's market shares for cornstarch and corn syrup did not increase during the relevant time period of 1971 and 1972. Thus, the same course of conduct alleged to have brought about Dimmitt's business failure in 1972 could not have been thought to result both from the exercise of monopoly power *and* an effort to acquire such power. The jury, clearly, chose the former view of these events.

An even more basic question concerns why the Fifth Circuit should rely on the inherently subjective process of psychoanalyzing the jury as a substitute for an objective review of the evidence in the record concerning the dangerous probability issue. Since the court determined that there was insufficient evidence to support the finding that CPC possessed monopoly power, it would certainly be reasonable to conclude that Dimmitt had also failed to meet its burden of proving a dangerous probability of CPC's success in acquiring monopoly power. Specifically, given the court's recognition that market shares of 25% or less were not consistent with the existence of monopoly power, and given the undisputed evidence that CPC's maximum market share goals were 25% for cornstarch and 17-18% for corn syrup (679 F.2d at 527 n.9), the record could support only one conclusion — there was no dangerous probability that CPC would succeed in achieving a monopoly.[16]

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[16] The Fifth Circuit did not even mention the undisputed evidence of significant new entry and expansion in the relevant markets for cornstarch and corn syrup, as well as the undisputed evidence

Thus, the jury's findings on monopolization and attempt to monopolize can readily be reconciled, and the no attempt to monopolize finding stands on its own, fully supported by substantial evidence in the record. Under these circumstances, the court of appeals did not need to remand the no attempt to monopolize finding for a new trial in order to dispose of the monopolization finding.

This Court has never specifically addressed the question of the limits on the authority of courts of appeals to order new trials of jury findings that have not been appealed.[17] Because this area of the law is not settled, however, the Fifth Circuit's claim of unlimited jurisdiction to order new trials under Rule 50(d) creates a serious problem for federal district courts. Several members of this Court have spoken in recent years concerning the increasingly burdensome caseloads of district courts which threaten to under-

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concerning the extreme competitiveness of these markets, which totally undermine the contention that CPC was likely to succeed in monopolizing these markets. *See* Brief of Appellant at 31-38; III P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 831, at 336 (1978).

[17] On more than one occasion, however, this Court has indicated that trial courts are far better qualified than courts of appeals to determine whether new trials should be ordered. *See Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). *Cf. Small v. Olympic Prefabricators, Inc.*, 588 F.2d 287, 290 (9th Cir. 1978) (Under Oregon law, an appellate court does not have power to reverse a judgment based on an error that has not been preserved and appealed.).

In *Langnes v. Green*, 282 U.S. 531 (1931), this Court stated in dictum that it had jurisdiction to review objections even though they had not been raised in a petition for certiorari. *Id* at 538. The Court held, however, that in any event, the respondent's failure to raise an objection in a cross-petition for certiorari was immaterial because in urging this objection, he was seeking to affirm rather than reverse the decree of the court of appeals. *Id.* (citing *United States v. American Railway Express Co., supra* pp. 7-8). In addition, the Court did not discuss, even in dictum, the special circumstances that would justify its exercise of this admittedly limited jurisdiction.

mine our entire system of justice. The record of the district court's performance in this case, including her submission of all five claims asserted by Dimmitt, demonstrates that she conscientiously and carefully gave Dimmitt a full and fair trial.[18] The district courts in this country have more than enough cases to try without having unnecessary retrials imposed because appellate courts disagree with the jury's assessment of conflicting evidence.[19] CPC urges this Court to declare that a court of appeals has no authority to order a new trial of a jury finding that has not been appealed and that need not be considered in order to dispose of a separate finding properly raised on appeal.

II. The Fifth Circuit's Remand of the Jury's Finding on the Attempt to Monopolize Offense Directly Conflicts with Prior Decisions of This Court Concerning the Seventh Amendment Right to a Jury Trial.

The Seventh Amendment of the Constitution provides that in federal civil lawsuits, "the right of trial by jury shall be preserved, and *no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (emphasis added) By positing a supposed inconsistency in jury findings that can readily be explained and reconciled, the Fifth Circuit has violated established principles declared in pre-

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[18] Dimmitt's counsel, a highly experienced antitrust trial lawyer, clearly made a conscious election to seek judgment on the verdict rather than to attack the jury's independent finding on the attempt to monopolize count.

[19] A court of appeals, remote from the realities of the trial, readily persuades itself to accept the documentary record before it as the litigative universe in which to try the issues, even those not before it, *de novo*. It is all too apparent from a reading of the court's opinion in this case that, having drawn its own conclusions on the merits, the court recast the jury's Section 2 findings to conform to its views, thereby subverting the no attempt verdict in order to justify relitigating the case.

vious decisions interpreting the Seventh Amendment.[20] To insure the continued vitality of our jury trial system, this Court should announce clearly that under the Seventh Amendment, a conflict in jury findings must be unambiguous and irreconcilable in order for a court of appeals to order a new trial.

In *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355 (1962), the court of appeals had held that the facts found by the jury as the basis for the primary defendant's liability also necessarily established a third-party defendant's liability under a related, but distinct, claim; accordingly, after affirming the judgment against the primary defendant, it had reversed the judgment for the third-party defendant. This Court reversed the court of appeals and reinstated the entire jury verdict:

> We might agree with the Court of Appeals had the questions of fact been left to us. But *neither we nor the Court of Appeals can redetermine facts found by the jury* any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Id. at 358-59 (emphasis added).

The Court in *Atlantic & Gulf Stevedores* determined that the apparent conflict within the jury's verdict could rationally be attributed to the slight differences between the theories under which the defendant and the third-party defendant were alleged to be liable. That being the case,

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[20] The Fifth Circuit relies on Fed. R. Civ. P. 50(d) as supposed authority for its new trial order in this case. 28 U.S.C. § 2072, however, explicitly states that the rules of civil procedure promulgated by the Supreme Court "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

the court of appeals was barred by the Seventh Amendment from upsetting the jury's verdict based on its own view of the evidence:

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. *For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.*

Id. at 364 (emphasis added). In *Gallick* v. *Baltimore & Ohio Railroad*, 372 U.S. 108, 119 (1963), this Court reiterated that courts "must attempt to reconcile the jury's findings, by exegesis if necessary, . . . before [they] are free to disregard the jury's special verdict and remand the case for a new trial."

In explaining its rationale for ordering a new trial, the Fifth Circuit does not expressly rely on a supposed conflict between the jury's findings on the monopolization and attempt to monopolize offenses. *See* 679 F.2d at 533-34.[21] Rather, according to the court, a new trial is required because "[t]he only conceivable explanation for the jury's verdict" is that the jury felt an affirmative finding of an attempt to monopolize was "redundant and unnecessary" after it had found CPC guilty of monopolization. *Id.*[22]

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[21] The court's avoidance of any reference to a conflict in jury findings probably stems from its own recent decisions clearly recognizing the Seventh Amendment requirement imposed on courts of appeals by *Atlantic & Gulf Stevedores* and its progeny. *See Alverez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1040 (5th Cir. 1982); *Mercer v. Long Mfg. N.C., Inc.*, 665 F.2d 61, 65-66 (5th Cir. 1982); *Harville v. Anchor-Wate Co.*, 663 F.2d 598, 604 (5th Cir. 1981) (Gee, J.).

[22] As support for this conclusion, the Fifth Circuit quotes the Areeda and Turner treatise as follows: "To say that one who has monopolized has also attempted to monopolize is redundant and adds nothing to the scope of available remedies. The

This conclusion, however, necessarily implies that under the court's view of the evidence, the jury could not possibly have found CPC liable for monopolization and not liable for an attempt to monopolize. Thus, in the Fifth Circuit's view, a new trial will allow a second jury to return the verdict on the attempt to monopolize count that the first jury presumably would have reached if it had known that its monopolization finding would be set aside.

As previously explained, there is no irreconcilable conflict between the jury's affirmative finding on monopolization and its negative finding on attempt to monopolize. *See supra pp.* 11-15. It is mere speculation for the Fifth Circuit to assert unequivocally that the jury felt a finding of an attempt to monopolize was "redundant and unnecessary" in light of its finding of monopolization. For any of several reasons relating to the differences between the elements of the two offenses and the evidence required to prove those elements, the jury could logically have found that CPC had monopolized the relevant markets for cornstarch and corn syrup, but had not also attempted to monopolize those markets. Contrary to this Court's directive in *Atlantic & Gulf Stevedores,* the court of appeals in this case has engaged in "a search for one possible view of

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attempt is merged into the completed offense." 679 F.2d at 531, 534 (quoting III P. Areeda & D. Turner, Antitrust Law ¶ 830e, at 335 (1978)).

This quotation, however, should not be construed to support the proposition that there is no difference between the monopolization and attempt to monopolize offenses. The sentence in the treatise immediately following the two quoted sentences makes this point clear: "Of course, the plaintiff may plead both offenses and allow the court to base its disposition on *either* or neither offense as the evidence emerges." (emphasis added) Even the Fifth Circuit acknowledges that the two offenses do not inevitably occur together: "Note that we are not saying that all monopolization offenses must necessarily involve an attempt offense." 679 F.2d at 534 n.20.

the case which will make the jury's finding inconsistent" when there are several other views that make "the jury's answers to special interrogatories consistent." *See* 369 U.S. at 364.

This is not a case such as *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808-09 (1949), where there was evidence supporting a second basis of liability, but that issue had not been submitted to the jury. Nor is this case like *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967), where the jury found the defendant negligent in one respect and simply did not answer four additional interrogatories inquiring about other possible grounds of negligence. In these two cases, there were no jury findings to be protected by the Seventh Amendment. Furthermore, the failure of the *Iacurci* jury to answer the four interrogatories strongly indicated that it considered such answers "redundant and unnecessary" in the light of the answer it had already given.[23] In this case, it is only surmise by the Fifth Circuit that the jury reached a similar conclusion in answering affirmatively on the monopolization interrogatory and negatively on the attempt to monopolize interrogatory.

The test of when answers to interrogatories are so in conflict that they cannot be reconciled is properly a stringent one. *See, e.g., Gallick* v. *Baltimore & Ohio Railroad*, 372 U.S. 108, 119-21 (1963). In *Mercer* v. *Long Manufacturing N.C., Inc.*, 665 F.2d 61 (5th Cir. 1982), the

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[23] This Court remanded for consideration of a new trial because the jury had not answered four of the five interrogatories asking about possible grounds of negligence. While the Court disagreed with the conclusion of the court of appeals that the jury's failure to answer these interrogatories demonstrated that the defendant's negligence was not established, the clear implication was that a new trial would not have been appropriate if the jury had answered these interrogatories in the negative, as was the case here. *See* 387 U.S. at 87-88.

jury found that the defendant had committed a breach of warranty, but had not violated the Texas Deceptive Trade Practices Act, even though the jury had been instructed that a breach of warranty is a violation of the Act. The Fifth Circuit held that this conflict in jury findings satisfied the Seventh Amendment test and remanded both findings for a new trial. *Id.* at 65-66. In this case, by contrast, the monopolization and attempt to monopolize counts required different elements of proof, the jury was separately instructed concerning those different elements, and the jury was expressly instructed that three separate offenses are included within Section 2 of the Sherman Act and that "[y]ou are to consider separately the facts with regard to each alleged offense." 679 F.2d at 531-32 & n.17. Thus, in concluding that "[t]he only conceivable explanation" for the negative answer on the attempt to monopolize count was that "the jury saw the attempt offense as redundant and unnecessary given its finding of the more serious violation" (679 F.2d at 534), the Fifth Circuit has assumed that the jury disregarded the explicit instruction to consider separately the facts with regard to each alleged offense, has violated CPC's Seventh Amendment right to a jury trial, and has rendered a decision in direct conflict with prior decisions of this Court.[24]

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[24] The Fifth Circuit's new trial order also conflicts with decisions of other courts of appeals which have followed *Atlantic & Gulf Stevedores*. *See Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 293 (3d Cir. 1980); *Franklin Music Co. v. American Broadcasting Cos.*, 616 F.2d 528, 533-34 & n.4 (3d Cir. 1979) ("The scope of this court's review of jury findings is thus far narrower than the clearly erroneous standard to be applied in review of facts found in non-jury trials."); *Wagner v. Int'l Harvester Co.*, 611 F.2d 224, 228-29 & n.5 (8th Cir. 1979); *Ressler v. States Marine Lines, Inc.*, 517 F.2d 579, 582 (2d Cir.), *cert. denied*, 423 U.S. 894 (1975); *Henry v. A/S Ocean*, 512 F.2d

Under the evidence in this case, as noted above, CPC could not possibly have been both monopolizing and attempting to monopolize to Dimmitt's detriment during the relevant time period. *See supra* pp. 13-14. These two separate antitrust charges presented the jury with alternative, indeed inconsistent, versions of the events in 1971 and 1972 which led to Dimmitt's business failure. The jury's findings indicate that it accepted a factual view based on a theory of defensive monopolization, albeit on a legally erroneous premise concerning the requirements for proof of monopoly power. Yet the remand ordered by the court of appeals would permit a second jury to take a different and perhaps contradictory view of the same basic facts. The Seventh Amendment was obviously designed to prevent such an anomalous result.[25]

401, 405-06 (2d Cir. 1975); *Kirkendoll v. Neustrom*, 379 F.2d 694, 699 (10th Cir. 1967). *Cf. Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1055 (4th Cir.) (Because "our power of review continues to be limited by the Seventh Amendment, . . . [w]e may not . . . weigh the evidence, pass on the credibility of witnesses, or substitute our judgment of the facts for that of the jury."), *cert. denied*, 429 U.S. 980 (1976).

[25] The fact that the Fifth Circuit has ordered a new trial should not deter this Court from accepting this application for certiorari. This Court has reviewed new trial orders issued by courts of appeals when the ruling below was "fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In this case, a resolution in CPC's favor of the issues raised in this petition for certiorari would finally conclude this protracted antitrust suit. Furthermore, CPC's Seventh Amendment rights are meaningless if they can only be invoked after a lengthy and expensive second trial.

CONCLUSION

The antitrust issues in this case have now been fully resolved: the court of appeals reversed as a matter of law the judgment based on monopolization, the jury's only finding in Dimmitt's favor. The Fifth Circuit's order of a new trial on the attempt to monopolize count, however, raises procedural and constitutional issues of far broader significance which concern the critical division of responsibilities between judges and juries in our system of jurisprudence. CPC respectfully urges this Court to consider these important issues, to preserve the integrity of the American jury system, and to reverse the unprecedented order of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were sent by United States mail, first-class postage prepaid, to the following counsel of record for Respondent, Dimmitt Agri Industries, Inc., this 10th day of January, 1983:

JOSEPH M. ALIOTO
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.....
ROBERT J. MALINAK

APPENDIX—Continued

the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

This Court finds that under Rule 9(b), petitioner has failed to allege new or different grounds for relief, and that the prior determination made by the Court was on the merits. In addition, the Court further finds that petitioner could and should have alleged the grounds now being asserted herein in the prior petitions filed with the Court. Thus, the Court finds that petitioner's current application constitutes an abuse of the writ. It is clear that advancing grounds in a one-at-a-time fashion is an intolerable abuse of the writ of habeas corpus. *Fulford v. Smith*, 432 F.2d 1225 (5 Cir. 1970). Furthermore, Rule 9 is designed to eliminate repetitive assertions of identical claims and drawing out of litigation by deliberate presentation in bits and pieces. *Johnson v. Copinger*, 420 F.2d 395 (4 Cir. 1969). It is clear that Mr. Sinclair is an experienced writ writer and has filed numerous petitions with this Court contesting both his murder and his armed robbery convictions. The allegations raised in this particular application are allegations that could and should have been raised earlier in the two prior applications filed in this Court.

There simply must be a time when a conviction entered in a state court becomes final. To allow an inmate to continually raise the same issues to overturn a state court conviction is a clear abuse of the judicial system. There comes a time when a court must conclude that a conviction is valid and that the person who was convicted should serve the sentence prescribed by law. This is such a case. Mr. Sinclair entered the guilty plea to the armed robbery charge with full knowledge of the consequences of his plea while represented by competent counsel. Thus, for the third time, the Court must and does reject petitioner's application for a writ of habeas corpus.

DIMMITT AGRI INDUSTRIES, INC., a Texas corporation, Plaintiff-Appellee,

v.

CPC INTERNATIONAL INC., Defendant-Appellant.

No. 80-2065.

United States Court of Appeals, Fifth Circuit.

July 2, 1982.

Opinion on Denial of Rehearing and Rehearing En Banc Oct. 12, 1982.

Farmers' cooperative engaged in the manufacture of corn starch and corn syrup brought antitrust suit against corn starch and corn syrup manufacturer. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., denied defendant's motion for judgment n. o. v., after jury verdict of monopolization under the Sherman Act, and defendant appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) evidence that defendant exercised a significant degree of control over price in the national corn syrup and corn starch market was insufficient to overcome the presumption against monopoly power implied by defendant's maximum possible market shares of 25% and 17% for the national corn starch and national corn syrup markets respectively, and thus defendant could not be found to have committed completed monopolization offense under section 2 of the Sherman Act, and (2) where only conceivable explanation for jury's verdict finding defendant guilty of monopolization but not guilty of attempt to monopolize was that jury saw the attempt offense as unnecessary given its finding of the more serious violation, and where jury's verdict finding defendant guilty of completed monopolization offense was reversed, the only remedy consistent with justice was to remand for a new trial on the attempt claim.

Reversed and remanded.

Petition for panel rehearing denied.

1. Federal Courts ⇐643

Contention in defendant's motion for directed verdict, that there was no evidence

that defendant possessed monopoly power in any relevant market, was sufficient to preserve for appeal defendant's contention that defendant, with a market share of no more than 21%, could not, as a matter of law, have monopoly power. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

2. Monopolies ⇐12(1.3)

Monopoly power is the power to control price or exclude competition. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

3. Monopolies ⇐12(1.3)

The essence of completed monopolization offense under section 2 of the Sherman Act involves two elements, capacity and deliberateness; the section 2 plaintiff must demonstrate possession of monopoly power in relevant market and willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

4. Monopolies ⇐12(1.3)

The attempted monopolization offense has two elements: specific intent to accomplish illegal result, and dangerous probability that the attempts will be successful. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

5. Monopolies ⇐28(7.1)

A plaintiff under section 2 of the Sherman Act attempting to prove either completed monopolization or attempt must provide jury with sufficient evidence to permit it to define the relevant geographic and product market. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

6. Monopolies ⇐12(1.3)

Proof of relevant market in attempt cases under section 2 of the Sherman Act is required in connection with the dangerous probability of success element of the attempt offense; thus, courts often state the dangerous probability and relevant market requisites as one combined requirement of establishing a dangerous probability of monopolization in any relevant market. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

7. Monopolies ⇐28(7.1)

Evidence that defendant exercised a significant degree of control over price in the national corn syrup and corn starch market was insufficient to overcome the presumption against monopoly power implied by defendant's maximum possible market shares of 25% and 17% for the national corn starch and national corn syrup markets respectively, and thus defendant could not be found to have committed the completed monopolization offense under section 2 of the Sherman Act. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

8. Monopolies ⇐12(1.6)

A distinction between an actual monopolization claim and an attempt claim is the specific intent requirement in attempt cases. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

9. Federal Courts ⇐937, 943

Where only conceivable explanation for jury's verdict finding defendant guilty of monopolization but not guilty of attempt to monopolize was that jury saw the attempt offense as redundant and unnecessary given its finding of the more serious violation, and where jury's verdict finding defendant guilty of completed monopolization offense was reversed, the only remedy consistent with justice was to remand for a new trial on attempt claim; at the new trial, jury would be given opportunity to determine whether, although defendant's relevant market shares were inadequate to constitute achieved monopoly power, they were sufficient to constitute a dangerous probability of monopolization. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

Baker & Botts, Theodore F. Weiss, Jr., Robert J. Malinak, Houston, Tex., for defendant-appellant.

Witherspoon, Aikin & Langley, James Witherspoon, Hereford, Tex., Joseph M. Alioto, Lawrence Appel, San Francisco, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, RUBIN and GARZA, Circuit Judges.

GEE, Circuit Judge:

This is an appeal from the district court's denial of the defendant's motion for judgment n. o. v. after a jury verdict of monopolization under the Sherman Act. Because we find that the section 2 monopolization verdict cannot, as a matter of law, stand, we reverse and remand for a new trial.

Sixty-six years ago, the United States charged a defendant, Corn Products Refining Company, with combining illegally in restraint of trade and monopolizing in violation of sections 1 and 2 of the Sherman Act.[1] Then District Judge Learned Hand, in an opinion long familiar to students of antitrust law, *United States v. Corn Products Refining Co.*, 234 F. 964 (S.D.N.Y. 1916), *appeal dism'd*, 249 U.S. 621, 39 S.Ct. 291, 63 L.Ed. 805 (1919) (hereinafter cited as *Corn Products*), found the defendant guilty of the various antitrust offenses alleged. Specifically, the court found that the defendant had combined into an organization that conspired to monopolize and restrict commerce in the manufacture and sale of starch, glucose, grape sugar, and various syrups by, inter alia, agreeing to sell the various products at unreasonably low fixed prices, thereby preventing new competitors from entering the field and driving out those already engaged in the business. The evidence of monopolizing intent presented to the court consisted of internal memoranda by the officers of the defendant company, acknowledging their belief that Corn Products Refining "had entire control over the price at which the product should be sold." *Id.* at 992. The court had this to say about the nature of such evidence:

> The officers of the Corn Products Refining Company apparently had a custom of communicating with each other by typewritten, unsigned memoranda. Apparently it was often difficult for them to interview each other personally, and the affairs of the company were discussed between them by means of these memoranda with the utmost frankness. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony. In the face of these memoranda, which for some strange reason were preserved, there can be no question in my mind of the continuous and deliberate purpose of the Corn Products Refining Company, by every device which their ingenuity could discover to maintain as completely as possible their original domination of the industry. That they recognized the impossibility of an absolute exclusion of other glucose and starch manufacturers is true enough, for they were minutely advised as to all conditions of the industry. But, while recognizing this inability, they in no wise conceded among themselves that their conduct could not have, and should not have, a depressing influence upon the growth of any competition. In considering the various devices adopted for that purpose, I shall paraphrase the memoranda in detail; but at the outset it is important to remember

1. 15 U.S.C. § 1 provides, inter alia:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.... Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this Title shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 provides, inter alia:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor ....

that permeating the whole of their conduct, certainly down to the year 1912, there runs the intent which I have mentioned, an intent the execution of which it is the precise purpose of the anti-trust act to foil.

Id. at 978.

Despite the passage of time (or perhaps because of it), the officers of Corn Products Refining, now CPC International Inc. ("CPC"), have not learned the perils of incriminating internal memoranda. Students of antitrust law may consequently be excused a feeling of déjà vu upon reading the facts in this case. This appeal grows out of a jury verdict finding section 2 Sherman Act monopolization in a private antitrust suit by Dimmitt Agri Industries, Inc. ("Dimmitt") against CPC. Dimmitt is a farmers' cooperative that constructed a corn wet milling plant in the Texas panhandle and, in late 1970, commenced the manufacture of cornstarch and, later, corn syrup. CPC, a Delaware corporation headquartered in New Jersey with production plants in various foreign countries, is the largest producer in the national corn wet milling market. In late 1972, Dimmitt was allegedly "forced out" of the corn wet milling market, and Amstar Corporation, the nation's largest sugar producer, took over operation of Dimmitt's plant in 1973. In 1974, Dimmitt sued CPC and others in the corn wet milling industry. All defendants except CPC settled before trial. Dimmitt's allegations and causes of action against CPC are similar to those involved in the 1916 case discussed above. Dimmitt alleged five antitrust theories: (1) a price-fixing conspiracy under section 1, Sherman Act; (2) conspiracy to monopolize, (3) attempt to monopolize, (4) monopolization, all under section 2, Sherman Act; and (5) illegal price discrimination under the Robinson-Patman Act.

The factual record, developed in the course of an eight-week trial before a jury, was extensive. Thousands of pages of documentary exhibits were introduced, and 35 witnesses testified, either personally or by deposition. Despite the nearly 6,000-page transcript of proceedings, the underlying theory of plaintiff Dimmitt's case was straightforward and strikingly similar to that of the 1916 proceeding: essentially, Dimmitt alleged that CPC fixed unreasonably low prices in order to exclude competition, especially Dimmitt, from the national markets for cornstarch and corn syrup. Like the government in 1916, Dimmitt purported to demonstrate its case through the defendant's own incriminating internal memoranda, and, as in the earlier proceeding, the tactic proved ultimately successful. The case was submitted to the jury on special interrogatories on all five antitrust theories.[2] The jury found for CPC on all theories except the crucial monopolization claim. It found that "during the relevant

2. The text of these interrogatories, along with the jury's answers to each, were as follows:

INTERROGATORY NO. I

(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC combined or conspired to fix prices in violation of Section 1 of the Sherman Act?

Answer: "Yes" or "No"

ANSWER: No

If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).

(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?

Answer: "Yes" or "No"

ANSWER: _____

(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?

Answer: "Yes" or "No"

ANSWER: _____

INTERROGATORY NO. II

(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC monopolized a relevant market in violation of Section 2 of the Sherman Act?

Answer: "Yes" or "No"

ANSWER: Yes

If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).

(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?

Answer: "Yes" or "No"

ANSWER: Yes

(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?

time period, the defendant CPC monopolized a relevant market in violation of Section 2 of the Sherman Act" and that this violation was a proximate cause of injury to Dimmitt's business. The court trebled the damages awarded by the jury and added attorneys' fees. Judgment for Dimmitt was entered for $5.3 million.

Answer: "Yes" or "No"
ANSWER: No
INTERROGATORY NO. III
(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC attempted to monopolize a relevant market in violation of Section 2 of the Sherman Act?
Answer: "Yes" or "No"
ANSWER: No
If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).
(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?
Answer: "Yes" or "No"
ANSWER: _____
(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?
Answer: "Yes" or "No"
ANSWER: _____
INTERROGATORY NO. IV
(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC combined or conspired to monopolize a relevant market in violation of Section 2 of the Sherman Act?
Answer: "Yes" or "No"
ANSWER: No
If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).
(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?
Answer: "Yes" or "No"
ANSWER: _____
(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?
Answer: "Yes" or "No"
ANSWER: _____
INTERROGATORY NO. V
(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC discriminated in prices in violation of Section 2(a) of the Robinson-Patman Act?

CPC's appeal focuses on one crucial distinction between the 1916 proceeding and the litigation here. Much of that earlier case was devoted to evidence of the market share in the glucose and starch trade controlled by Corn Products Refining Company.[3] In the proceedings under review here, the parties did not focus on market share.

Answer: "Yes" or "No"
ANSWER: No
If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).
(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?
Answer: "Yes" or "No"
ANSWER: _____
(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?
Answer: "Yes" or "No"
ANSWER: _____
If you have answered "Yes" to one or more Interrogatories Nos. I(b), II(b), III(b), IV(b), or V(b), then answer the following Interrogatory; otherwise, do not answer Interrogatory No. VI(a).
INTERROGATORY NO. VI(a)
What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Dimmitt Agri for the damage to its business or property which you have found was proximately caused by conduct of defendant in violation of the antitrust laws.
ANSWER IN DOLLARS AND CENTS, IF ANY:
$1,500,000.00
If you have answered "Yes" to one or more Interrogatories Nos. I(c), II(c), III(c), IV(c), or V(c), then answer the following Interrogatory; otherwise, do not answer Interrogatory No. VI(b).
INTERROGATORY NO. VI(b)
What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate DIMACO for the damage to its business or property which you have found was proximately caused by conduct of defendant in violation of the antitrust laws.
ANSWER IN DOLLARS AND CENTS, IF ANY:

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3. Thus, the New York district court noted that at a low point in the defendant's control, the "percentage of total glucose production, domestic and foreign, attributable to the defend-

The limited amount of documentary evidence presented suggests that during 1971 and 1972, the time period in which Dimmitt was competing in the corn wet milling industry, CPC's maximum possible market shares in the narrowest markets alleged by Dimmitt were: 25 percent in the national cornstarch market and 17 percent in the national corn syrup market. The narrow issue presented for our review, as stated in defendant's judgment n. o. v. motion, is whether a defendant with such a low market share can, "as a matter of law, have monopoly power, the essential prerequisite for a jury finding of monopolization."

I. PROPERLY RAISED?

[1] At the outset, we are met by Dimmitt's contention that CPC's "market share" argument is not properly before us because it was not raised in CPC's earlier motion for directed verdict. Under Fed.R.Civ.P. 50(a), "[a] motion for directed verdict shall state the specific grounds therefor." If a motion for directed verdict is denied, a party may move within ten days after entry of judgment "to have the verdict in any judgment entered thereon set aside and to have judgment entered *in accordance with his motion for a directed verdict* . . . ." Fed.R.Civ.P. 50(b) (emphasis added). The law on point is well established:

> A motion for judgment notwithstanding the verdict, like a motion for directed verdict, must state the grounds on which it was made. Since it is technically only a renewal of the motion for directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for a directed verdict.

Wright & Miller, *Federal Practice & Procedure: Civil* § 2537 (1971) (footnotes omitted). *Accord Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976); *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 67–68 (5th Cir. 1972).

In this case, CPC's motion for directed verdict alleged, inter alia, that: "with respect to monopolization there is no evidence that CPC possessed monopoly power in any relevant market, much less that CPC deliberately acquired or maintained such power." CPC's subsequent j. n. o. v. motion is, in our view, only a more detailed version of this "no evidence of monopoly power" ground for vacating the verdict. CPC's motion for j. n. o. v. stated, inter alia:

> A defendant with a market share of no more than 21 percent cannot, as a matter of law, have monopoly power, the essential prerequisite for a jury finding of monopolization. In other words, whatever other evidence of monopoly a plaintiff may have, a defendant cannot possibly, as a matter of law, "control prices or exclude competition" if its market share is as low as CPC's position in this case.

It requires no great familiarity with the law of antitrust to know that evidence of a defendant's market share is the principal tool used by courts to determine the existence of monopoly power. While a j. n. o. v. motion may not enlarge or assert new matters not presented in the motion for directed verdict, "technical precision is not necessary in stating the grounds for the motion [for directed verdict] so long as the trial court is aware of the movant's position." *United States v. Fenix & Scisson, Inc.*, 360 F.2d 260, 266 (10th Cir. 1966), *cert. denied*, 386 U.S. 1036, 87 S.Ct. 1474, 18 L.Ed.2d 599 (1967). Here there is no doubt that the trial court was aware of the movant's position, since CPC raised its market share contention in its objections to the jury charge. The rationale for the rule that a motion for j. n. o. v. cannot assert a ground not included in a motion for directed verdict is obviously to avoid "ambushing" the trial court and opposing counsel. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979). Since no such "sandbagging" was possible here, we conclude that

ant Corn Products Refining Company" was, in 1913, only 57% and, in 1914, 53%. 234 F. at 974. The defendant's percentage of grape sugar was over 90% in 1914, and its share of starch production was 58% in 1914. *Id.* at 975.

the merits of CPC's contentions on appeal are open for our review.

II. EVIDENCE OF MONOPOLIZATION.

Dimmitt's monopolization case against CPC was built around a series of CPC memoranda, many of which were stamped "confidential" and were between the highest corporate officials of that company. According to Dimmitt's theory of the case, CPC was, during the period 1970–72, "able to maintain and exercise the ability to control prices in and exclude competition from the cornstarch and corn syrup markets."

CPC, burdened with generally outmoded physical plants, was, according to a 1970 memorandum by its president, concerned with the possibility of competition by modernized cooperatives. These cooperatives, free of the burdens of some of the taxes faced by ordinary industrial concerns, could, CPC feared, produce a "higher quality product at lower cost." According to Dimmitt, its completely automated plant in the Texas panhandle was the main object of CPC's concern. Thus, in 1968 Plimpton, then president of CPC, sought to "kill" the Dimmitt project by "spread[ing] the word that we would certainly consider reducing our price as much as 50–75 cents per cwt. to defend this market [paper industry, starch market on the West Coast]." This threatened price cut was discussed when CPC visited International Paper, a potential Dimmitt customer for cornstarch, and announced that CPC would "probably assume pricing leadership in the starch market in the near future." Thereafter, coincidentally on December 1, 1970—the anticipated date of Dimmitt's market entry—CPC announced a new pricing policy for its mill-grade starch. Under this new "spot pricing," with an avowed purpose of stabilizing prices, CPC would no longer attempt to relate its cornstarch prices strictly to market fluctuations in the price of corn. At the same time, CPC lowered its cornstarch prices sold to the paper trade by a full 75 cents per hundredweight (cwt). By September 1971, apparently concerned with the threat of other farmer cooperatives following Dimmitt's lead, CPC memoranda were frankly acknowledging the need to "plan the marketing attack in order to discourage competitors from constructing new plants." In December 1971, the "CPC International Industrial Division Strategy Report" stated that CPC would "control competitors' share of market," "maintain position as the recognized price leader of the industry," and that, as a matter of policy:

> Price will be used primarily as a tool to reach or to maintain market share goals and to control and influence competitors' investment and growth. Price strategies will be directed toward long-term strength of position as a clear priority over short-term profitability.

According to CPC itself, the cornstarch "spot pricing" program "allows upsetting or stabilization of the market place at our discretion." The losses incurred as a result of the reduction in spot-grade starch prices were acknowledged in later CPC memoranda, along with assumed consequent difficulties for smaller competitors. Despite these losses and the then-soaring corn costs, by November 1971 CPC had cut its April 1971 price by a full $1.25 per hundredweight.

Dimmitt's memoranda evidence presents a similar scenario in the corn syrup market. Again CPC memoranda repeatedly refer to "price leadership" and "stabilization" of the corn syrup market. The thrust of Dimmitt's case was convincingly built around CPC memoranda that described its intentions in unmistakeable terms:

> The purpose of stabilizing the corn syrup market is admirable .... [S]everal years ago this same approach was tried and CPC reduced and market price of corn syrup to $4.00 base. All competitors promptly followed but we did not stay with the idea more than a few weeks when we began to raise prices again. This was the mistake.
>
> * * * * * *
>
> If we accept the new plan we must realize that we can go into a negative profit situation for an extended period of time .... I am sure that all competition will announce new market policies within a few hours after our announcement.
>
> * * * * * *

Mr. Fox's plan to establish pricing leadership and to stabilize the corn syrup market is a noble one indeed .... How low would we have to go to reach bottom? $4.00 to $4.50/cwt. which would be difficult in that our competitors have newer equipment with higher efficiency and lower selling costs.

* * * * * *

In theory and principle I agree with your proposal to establish pricing leadership and to stabilize the corn syrup market. As long as there is excess production and we continue our present policy of meeting competition, we will continue to be "whip sawed" by both competitors and buyers with the result of much lower margins and the survival of the fittest.... What I am saying is that once we start on this program, we must be prepared to go substantially lower before our competitors and customers fully understand that we are determined to be the price leader. If all levels of management are not willing to accept the consequences and pay the price then I think it would be advisable to use a different approach.... How far to "bottom"—I don't know but the saying "water seeks its own level" could be true in this case with the syrup producers taking a real bath before the desired discipline is reached.

Shortly after Dimmitt began production of corn syrup, CPC lowered its corn syrup prices. Eventually the corn syrup price went from $6.05 per cwt. to $3.40 per cwt., a price that, at least according to Dimmitt's expert, was below CPC's total and average variable costs.

Dimmitt produced other evidence of CPC's pricing strategy, including testimony by competitors that they regarded CPC as the price leader. The memoranda evidence of 1972, including one memo of November 6, 1972, after the CPC leadership learned that the Dimmitt plant had been taken over by Amstar, supports the view that at least the CPC leadership believed that its price strategy was successfully excluding competition from the market. Dimmitt's post-November 1972 memoranda evidence was especially damning to CPC's case. Thus, CPC's "corn syrup pricing program," announced November 1, 1972, stated:

OBJECTIVES

Provide leadership to market by (1) establishing a "climate" conducive to following CPC, and (2) setting a pricing pattern that can be easily understood, followed and monitored.

Establish climate by recognizing realistic base price.

Pre-announced price for specified periods.

Deterrent to not following is implied; return to November-December levels if we are undercut.

Lead industry to more reasonable returns, and prevent extended price commitments and/or confusion that preclude the opportunity for increases during capacity season (June-October).

Obtain for CPC the price leadership rewards of timing and the setting of price levels.

IMPLEMENTATION

1. Immediately announce "period" pricing per attached ($3.40/cwt. day to day) effective November 1, 1972.

....

3. In approximately ten days announce price for period January ($3.80 per cwt.). Drop if necessary to maintain orderly market (and share).

4. Price in one or two month periods, aiming toward $4.75/cwt. period price for tight supply/high volume months (June-October).

ALTERNATIVES CONSIDERED

....

3. Do nothing at this time. Rejected because competitors are anxious to know CPC's position and are looking to CPC to set 1973 tone. If we don't move, current $3.40 prices will start being extended into 1973.

This announcement of policy preceded a price increase in corn syrup that, in the eyes of CPC, was "being followed by the other suppliers."

Dimmitt's case culminates with a March 21, 1973, report by Eiszner, president and chief operating officer of CPC, to CPC's board of directors:

> As you recall, we finally brought [corn syrup] prices down to the $3.40 per cwt. level [in 1972] in an effort to convey the message to the industry that we were no longer going to give up market share to competitors who cut price. Our sales plan for 1973, simply stated, was to re-establish our leadership position in corn syrup, to gradually increase prices as long as there was no sign of price cutting....
>
> To set the scene for this 1973 marketing plan, we raised the price of corn syrup in December 1972, from $3.40 to $3.80 per cwt. The industry followed our pattern. No one played price cutter, and we held market share. On February 1 of this year, we again raised corn syrup prices to $4.30 per cwt. The industry followed, nobody shaded the price, and we held market share.
>
> Staley, Cargill, Corn Sweeteners, all have announced price increases to $4.65, to take effect March 30 of this year. We are following. Our plan is to either lead or follow price advances, up to the level at which new investment becomes economic. We will keep the price just below the new investment level until we are sold out. In the event anyone undercuts the list price, I have instructed our people to reduce prices, promptly and severely.
>
> There was a major celebration in our shop in February, when the product manager for corn syrup announced that we had a 27 cents per cwt. gross margin on corn syrup—the first time the number had been in the black in a year. Gentlemen, we are making progress.

In view of the incriminating nature of the memoranda evidence presented, Dimmitt can, with some justice, claim to have presented one of the clearest conduct evidence cases supportive of a monopolizing intent that has been presented to a court, possibly since *Corn Products* itself. Antitrust cases in which the plaintiff elicits admissions by the alleged monopolist that the company was out to exclude other competitors from the market are rare.[4] As in *Corn Products*, CPC's defense at trial to the monopolization claim was to attempt to cast its memorandum statements in a different light.

Especially through the testimony of Eiszner, CPC attempted to prove that it was, during all relevant times, simply trying to compete, "fair and square," with all of its competitors, including Dimmitt, in the midst of a ferocious price war. Accordingly, Eiszner testified that his pricing policies and motives had nothing to do with Dimmitt, that CPC's spot-price policy was a nonsinister method of changing the price of the product without regard to the cost of corn adopted in order to compete with larger producers unwilling to follow CPC's price decline, and that the various pricing strategies discussed by CPC executives involving Dimmitt and other potential farmer cooperatives were simply "what if" hypotheses that were never put into effect. In general, CPC witnesses testified that their motives throughout were simply to hold onto their own market share and that CPC was compelled by competitors and overproduction in the industry to take prices down. In addition, CPC attempted to portray Dimmitt's entry into the market as a poorly conceived move, doomed to failure from the start as the small company found itself in the midst of a highly competitive market "fueled by overcapacity in the industry."

4. Yet Dimmitt accomplished this more than once over the course of trial, especially during its cross-examination of Eiszner, the president of CPC. To cite but one example:

> Q .... You had the policy to conduct your marketing strategy in order to prevent the construction of new plants; is that right?
> A Construction or expansion of new plants, sir.
> Q Right?
> A We did not want new plants built before we could sell our capacity, sir; yes, sir.
> Q Right. And South Carolina was one of those that you wanted to prevent?
> A I would just as soon it didn't go ahead, sir. I don't deny that.

Since most of Dimmitt's evidence consisted of memoranda among highly placed CPC personnel, CPC's closing argument to the jury was understandably pitched at the credibility of its witnesses, all of whom tried to distance themselves from their memoranda statements. Counsel for CPC thus attempted to make the case turn on the jury's view of the credibility of Eiszner:

> They are still out there in the market place fighting for their lives, and they are competing. They are competitors. And if you don't—if you think that Jim Eiszner is a price fixer, so be it.
>
> You saw him. Do you think Jim Eiszner is a price fixer? That's your question to answer. Do you think Jim Eiszner is a monopolist? That's your question to answer. Do you think he attempted to monopolize? Do you think he attempted to discriminate against prices to get Dimmitt?

As in *Corn Products*, testimony by company executives attempting to contradict their memoranda statements "only served to affect the general credibility of [their] testimony." 234 F. at 978. The jury chose to believe the evidence of the memoranda, as interpreted by Dimmitt, over the live testimony of Eiszner at trial and found CPC guilty of monopolization.

On appeal, Dimmitt's theory of the case remains unchanged, but appellant CPC raises a proposition largely ignored in the proceedings below: assuming the CPC memoranda proved the company's monopolizing intent, did Dimmitt nonetheless present sufficient evidence, or indeed any evidence, that CPC actually possessed monopoly power in either the national corn syrup or national cornstarch markets during 1971–72? In short, was there any evidence presented to the jury to demonstrate that, regardless of the assumptions held by CPC management about their power to control prices and exclude competitors, CPC in reality possessed monopoly power during this period? This is the sole issue presented to us for review.

III. THE LAW AGAINST SECTION 2 MONOPOLIZATION.

[2–6] Monopoly power is "the power to control price or exclude competition." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1004, 100 L.Ed. 1264 (1956). The essence of the completed monopolization offense under section 2 involves two elements: capacity and deliberateness. The section 2 plaintiff must demonstrate "(1) the possession of monopoly power in the relevant market, and (2) the wiliful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1703–04, 16 L.Ed.2d 778 (1966); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1304 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). The attempt offense also has two elements: "(1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979). In our court a section 2 plaintiff attempting to prove either completed monopolization or attempt must provide the jury with sufficient evidence to permit it to define the relevant geographic and product market. *Id.* at 276, 284–86; *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982). The rule requiring proof of relevant market has been recognized by the Supreme Court. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L.Ed.2d 247 (1965). Proof of the relevant market in attempt cases is required in connection with the dangerous probability of success element of the attempt offense. Thus, courts often state the "dangerous probability" and "relevant market" requisites as one combined requirement of "establishing a dangerous probability of monopolization in a relevant market."

Annot., 27 A.L.R.Fed. 762, 768 (1976); *Spectrofuge*, 575 F.2d at 286.[5]

This court's insistence on proof of a relevant market is an outgrowth of the structural analysis, dependent on a showing of high market share in a relevant geographic-product market that has been consistently applied to monopoly cases since *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (hereinafter cited as *Alcoa*). Ever since this case, the most heavily contested issues in monopoly cases have typically revolved around the definition of relevant geographic or product market. Appellant here argues that demonstration of a high market share has now become the *exclusive* way of proving the completed monopolization offense. We find appellant's argument unnecessarily overbroad.

Structural analysis, along with the notion that a 90 percent or higher market share in a relevant market creates a presumption of monopolization was developed in *Alcoa* as a shortcut formula to demonstrate power to control prices or exclude competition. The early monopolization cases were not as concerned with high market share but dealt with monopolization claims on the basis of predatory exercise of market power.[6] The government in early cases, such as *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911); *United States v. American Can Co.*, 230 F. 859 (D.Md.1916), *appeal dism'd*, 256 U.S. 706, 41 S.Ct. 624, 65 L.Ed. 1181 (1921), attempted to demonstrate the actual exercise of market power to control prices or exclude competitors. The completed monopolization offenses in these early cases were largely based on what today we would call conduct analysis. These early cases viewed, for example, tortious attacks or threats on property, discriminatory price cutting, and sales by a vertically integrated firm at excessively high prices as predatory prices evidencing both elements of the completed monopolization section 2 offense. The modern cases do not explicitly overrule these early cases' approach; structural analysis, because it is "more objective" and easier to demonstrate, has merely displaced conduct analysis in proving the first element of the section 2 offense.[7]

Contrary to the appellant's contentions, this case is not one in which there was insufficient evidence of relevant market presented such as to be in violation of our rule in *Spectrofuge*.[8] In these proceedings

5. Some cases in the Ninth Circuit have, however, questioned the requirement of proof of relevant market in attempt cases. Annot., 27 A.L.R.Fed. at 768; *see, e.g., Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964).

6. To some extent, *Corn Products* reflects this approach.

7. Thus, a basic antitrust hornbook states:

> Justice White asked few instrumental questions [in *Standard Oil v. United States*]; his inquiry was sharply focused on whether power over price existed and was being exercised. It did not matter to him that the share of the crude market controlled by the combination was exceedingly small, since it appeared that power over crude prices was exceedingly large. Today, with elaborate theoretical tools for analyzing power, courts have developed a set of instrumental issues. They ask not the ultimate question, does the firm have power?, but a series of subsidiary ones like, what market does the firm engage in?, what is its share of that market?, are there entry barriers?, and the like. These instrumental inquiries are of true worth only in such degree as they throw light on the ultimate issue. Sometimes, however, they get in the way. They are allowed to block off appropriate responses toward which a more direct concern with power, such as that shown in *Standard Oil*, would lead.
>
> * * * *
>
> Market definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether power exists
>
> * * * *

Sullivan, *Antitrust* at 38, 41 (1977).

8. In *Spectrofuge*, 575 F.2d at 286, we held that:

> [T]here was insufficient evidence to support the jury's implicit finding that Beckman monopolized or attempted to monopolize a market comprised of the servicing of Beckman's scientific instruments or the submarket comprised of servicing its ultra-centrifuges. There was simply no evidence from which the jury could begin to measure Beckman's

there was compliance with our circuit's rule to provide sufficient evidence to define a relevant geographic and product market. The geographic market, national in scope, was the subject of stipulation by the parties. The relevant product market was a "contested fact issue" at trial, and Dimmitt unsuccessfully attempted to present certain evidence of CPC's alleged power in the levulose market as well as in the corn syrup and cornstarch markets. The court, however, excluded evidence pertaining to the levulose market, and Dimmitt's entire case thereafter focused on CPC's actions in the corn syrup and cornstarch markets and these actions' effects on Dimmitt's sale of corn syrup and cornstarch products. Hoyt, Dimmitt's consulting economist, testified as to the nature of these markets during the relevant years, and Dimmitt's memorandum evidence strongly indicates that CPC executives regarded their corn syrup and cornstarch products as recognizably distinct national markets. In addition, minutes of a September 1971 meeting of the "industrial council," as well as the testimony of Eiszner himself, presented the jury with evidence as to CPC's market shares in these two markets in 1971–72.[9]

This is not a case, therefore, in which a jury was asked to find monopolization on the basis of conduct evidence alone. We therefore do not attempt to resolve the issue of whether, after *Alcoa* and its progeny, conduct analysis (e.g., evidence of a company's predatory acts on competitors), *in the absence of any evidence of high market shares*, can ever make out a monopoly case. The question here is narrower: can conduct evidence, belied by undisputedly low market shares in the relevant markets, make out a completed monopolization offense?[10]

power to control prices or to exclude competition in the relevant market defined by Specterfuge.

9. The minutes from the industrial council gave the following information on CPC's market shares:

Starch Market share goal: 25%
Present market share: 21% (September 1971)
Historical market share: 27%
Corn syrup Market share goal: 17–18%
Present market share: 16%

At trial, Eiszner testified that in 1970 CPC's share of the market for mill-grade cornstarch was between 21 and 25 percent and that the figure for 1971 was in the same range, but he believed it was lower than in 1970. Eiszner estimated that in 1972 CPC's share of the mill-grade cornstarch market was "back up to about 25%." With respect to syrup, Eiszner testified that according to his best estimates CPC's market share was between 16½ and 17 percent in 1970, between 15½ and 16½ percent in 1971, and "around 14%" in 1972. Finally, Eiszner testified that since 1971 CPC's share of the national corn syrup market had dropped and had never reached 18 percent.

After review of the trial record, we agree with appellant's statements that CPC's maximum possible market shares in the narrowest markets alleged by Dimmitt, consistent with the evidence, were: 25% in the national cornstarch market and 17% in the national corn syrup market.

10. A similar question was raised but never resolved in *Fulton v. Hecht*, 580 F.2d 1243, 1246–47 (5th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1789, 60 L.Ed.2d 241 (1979), where the plaintiff alleged that defendant had a monopoly over the South Florida greyhound racing industry. The defendant controlled 25% of this market, "since it shares the South Florida dog track market with three other tracks which are, generally speaking, allocated an equal number of racing days per year." *Id.* at 1246. As in this case, the plaintiff argued that "market share is not the determinative factor in assaying the existence of monopoly power" and that "the sterile percentage of market approach should not be applied to the South Florida greyhound racing industry." *Id.* Plaintiff noted that:

> Although each track may have only 25 percent of the market, the fact that only one track is operating at any given time makes each track's power significantly greater than that of a firm whose sales represent 25 percent of the normal market. According to plaintiff, the economies of this industry are such that a dog owner must be able to race year round in order to be competitive. Ignoring the Broward County track for the moment, plaintiff contends that each track has absolute monopoly power during the three months of the year when it is the only track in operation. Thus, each track can dictate the terms of booking contracts.

Id. In the end, we had no need to resolve the issue presented, since the plaintiff "did not present any evidence that [defendant] used its power to enhance or maintain its position." *Id.* at 1247.

On appeal, Dimmitt does not challenge CPC's claim that during 1971 and 1972 its maximum possible market shares were 25 percent and 17 percent for the national cornstarch and national corn syrup markets respectively. Neither can we find, based on the evidence presented, as well as that excluded by the trial court, that the jury here could have had any relevant market in mind other than the national cornstarch and corn syrup markets. Dimmitt produced little, however, in the way of additional structural evidence at trial. Its economic expert Hoyt's testimony was limited; his analysis led him to the following rather general conclusions:

1. That the corn wet milling industry is highly concentrated with five firms accounting for over 71% of industry capacity.

2. That the demand for cornstarch and corn syrup is price inelastic.

3. That there are few if any substitutes for cornstarch and corn syrup.

4. That Dimmitt had an absolute cost advantage technologically, and thus was able to overcome the typical barriers to entry.

5. That there has been a consistent and predictable growth in demand for cornstarch and corn syrup over time and that this demand has equalled or exceeded increasing industry capacity.

6. That the product prices for cornstarch and corn syrup were inordinately low in 1971 and 1972 while Dimmitt was in business, and that those low prices cannot be explained statistically.

7. That the low product prices for cornstarch and corn syrup were not the result of normal economic and market forces, but, rather, were caused by the predatory pricing practices of the Defendants.

8. That the fixed and variable cost coefficients projected by Dimmitt were accurate and realistic, even under the adverse anticompetitive activity of the Defendants, and would have resulted in substantial long-run profits had it not been for the Defendants' successful attempt to illegally block Dimmitt's entry.

9. That the Defendants possessed the necessary market power, which was overtly displayed in order to exclude new competition from the corn wet milling industry....

Dimmitt is thus asking us to uphold a jury verdict of monopolization on the basis of structural evidence essentially limited to some very bare and very low percentage figures. Dimmitt does not present a structural explanation to compensate for the inordinately low market shares of its alleged monopolist. *Compare, e.g.*, plaintiff's explanation in *Fulton, supra* note 10. Dimmitt presents little to demonstrate that despite its undisputedly low market shares, CPC was structurally capable of maintaining anticompetitive low prices for a sustained period of time. Dimmitt cannot cite us to any case in which monopolization was found on the basis of such meager evidence and despite undisputed proof of market shares significantly below 50 percent. Indeed, our review of the case law suggests that no such case exists.[11]

11. The following are Supreme Court cases upholding a finding of monopolization, with the defendants' percentage of relevant market indicated: *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (91%); *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) (87%); *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959) (81%); *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911) (86%); *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911) (90%); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), *adopted and approved*, *American Tobacco Co. v. United States*, 328 U.S. 781, 811–14, 66 S.Ct. 1125, 1139–41, 90 L.Ed. 1575 (1946) (90%); *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass.1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954) (75%); *United States v. Pullman Co.*, 50 F.Supp. 123 (E.D.Pa. 1943), *aff'd per curiam*, 330 U.S. 806, 67 S.Ct. 1078, 91 L.Ed. 1263 (1947) (100%). Indeed, former Assistant Attorney General Turner, head of the antitrust division, testified some time ago before a congressional committee that: "Section 2 refers to monopolies but not to oligopolies, and it has never been found to

Moreover, there is considerable support for the proposition that low market shares, if undisputed, make monopolization an impossibility as a matter of law. In *United States v. United States Steel Corp.*, 251 U.S. 417, 40 S.Ct. 293, 64 L.Ed. 343 (1920), the Supreme Court suggested that market power should not be equated with monopoly power. It refused to find monopoly despite a market share of 50 percent and stated that "[t]he power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly was therefore not achieved . . . ." *Id.* at 444–45, 40 S.Ct. at 296–97. And in *Alcoa*, an opinion later cited by the Supreme Court as being tantamount to a Supreme Court decision, *see American Tobacco Co. v. United States*, 328 U.S. 781, 811–14, 66 S.Ct. 1125, 1139–41, 90 L.Ed. 1575 (1946), the Second Circuit, through Judge Learned Hand, stated that while a 90 percent market share was enough to constitute monopolization, "it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not." 148 F.2d at 424.

Three of our recent decisions also compel the conclusion that market shares in the range of 16 to 25 percent, such as those held by CPC, are insufficient—at least absent other compelling structural evidence—as a matter of law to support monopolization. In *American Telephone & Telegraph Co. v. Delta Communications Corp.*, 408 F.Supp. 1075 (S.D.Miss.1976), *aff'd per curiam*, 579 F.2d 972 (5th Cir. 1978) (adopting district court opinion), *modified on other grounds*, 590 F.2d 100 (5th Cir. 1979), the district court granted summary judgment on a counterclaim filed by Delta against the three major television networks. Delta, a UHF Mississippi television station, alleged that "the networks together monopolized the television industry." 408 F.Supp. at 1106. Granting summary judgment for the networks, the court stated:

> Courts often have struggled with what percentage of market domination constitutes monopoly influence. . . . Possessing as they do significantly less than 50 percent of the network business, none of the network counterdefendants has the necessary market domination to be susceptible, individually, of being found to be a monopolist.

Id. (citations omitted). In *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1386 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977), we held that: "Because the correct product market was ornamental plants, and Yoder's share of that market was approximately 20 percent, . . . as a matter of law Yoder could not have been guilty of monopolization." Finally, in *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 850 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976), we concluded that Coca Cola's 22 percent market share of all independent bottlers was "an insignificant market share to establish monopolization in violation of section 2." [12]

cover a monopoly in an industry in which the leading firm accounts for less than 70 percent of the market." *Status and Future of Small Business, 1967: Hearings Before the Senate Select Comm. on Small Business*, 90th Cong., 1st Sess. 714 (1967), *quoted in Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969).

12. Neither can Dimmitt draw support from our recent authorities upholding monopolization claims (references are to defendants' market shares): *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1352 & n.18 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1982) ("approximately 50%"); *Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964, 981 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978) (between 71 and 76%); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (90%); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 194 (5th Cir. 1965), *cert. denied*, 382 U.S. 977, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) (between 85 and 90%); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F.Supp. 780, 790–91 (S.D.Tex.1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973) (85%).

Even the relatively low market share (50%) in *Page Airways* is deceptive. The relevant market in that case involved sales of electronic equipment and interior furnishings for an extremely differentiated product—a Grumman Gulfstream II ("G–II") airplane. On the question of monopoly power, we stated:

> Defendants argue that they could not be found guilty of monopolizing as a matter of law, since their market power was insufficient to support such a charge. . . . To be sure, Page's market power did not rise to the level existing in some cases that find actual

Leading academic authorities support our conclusion. Thus Areeda and Turner ask, "What quantum of power is to be characterized as 'monopoly power' in the legal sense for purposes of section 2"—a question that assumes that not all exercises of market power violate the strictures of section 2. Areeda & Turner, *II Antitrust Law* ¶ 600 at 1 (1978) (hereinafter cited as Areeda & Turner II). The authors' discussion of *Alcoa, supra*, is instructive. They argue that while a high (90 percent) market share does not necessarily tell us the degree of market power possessed, a low market share significantly bears on power over price.

> A producer with, say, 30% of the market could raise price by restricting his output if his competitors could not expand theirs. To cut supply by 10%, however, he would have to cut his own output by one third, which could be offset by only a 14% increase in the output of competitors, which they might be able to effect without expansion of capacity.

Areeda & Turner II, ¶ 530 at 396. Section 2 is, according to the authors, directed at persistent market power. Transitory control over prices, ever present in a competitive economy—in large part due to lags in the responses of other buyers or producers—is not the subject of the completed monopolization offense.[13] For this reason, Areeda and Turner conclude that evidence of actual control over prices—conduct evidence—is inherently weak, giving

> no reliable clue to the degree of market power that the actor possesses, and he may even have none. Relatively slight economic advantages are typically worth the legal or other costs of protecting them.... Conduct, in short, will rarely if ever establish substantial market power. Where power is relevant to an antitrust defense, conduct can be taken as sufficient proof only where the power requirement itself is highly attenuated.

Id. ¶ 515 at 345.[14]

[7] We do not dispute Dimmitt's contention that its memoranda evidence, weighed with all reasonable inferences drawn in favor of the jury verdict, *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), supports the conclusion that during 1971–72 CPC exercised a significant degree of control over price.[15] We conclude, however,

> monopolization. However, when Page's market share is viewed alongside the evidence of the number of actual competitors, the high barriers to entry, the limited number of G–II's remaining at the time of the trial to be produced, and Page's power over price, we believe the court below correctly submitted the issue to the jury.

624 F.2d at 1356–57 (citations omitted). The sale of even a single additional aircraft could have significantly varied Page's market share. As the Sixth Circuit concluded in *Borden, Inc. v. FTC*, 674 F.2d 498, 512 (6th Cir. 1982):

> When a seller possesses an overwhelmingly dominant share of the market, however, and differentiates its product from others through a recognized and extensively advertised brand name, thereby enabling the seller to control prices or unreasonably restrict competition, then monopoly power may be found to exist. Here Dimmitt did not dispute that fungible, undifferentiated products were involved.

13. Thus, Areeda and Turner conclude:

> (1) The monopolization offense depends upon proof that substantial market power was (a) possessed by the defendant at the time of his exclusionary conduct, (b) achieved as a result of such conduct, or (c) threatened to be achieved by that conduct....
>
> (2) We reject the arguments that the monopolization offense can be established for firms without such power solely on the basis of undesirable, or even of significantly anticompetitive, behavior. In particular, (a) power within a reasonably defined market is required, and (b) any refined effort to base the monopolization finding on an inverse "sliding scale" that varies the power component of the monopolization offense with the "invidiousness" of the conduct is doomed to failure. Yet, more gross versions of a sliding scale approach are inevitably involved in dealing with conduct on the road to monopoly ... and conduct that threatens but does not achieve monopoly power....

Areeda & Turner, *III Antitrust Law* ¶ 810 at 296 (1978) (hereinafter cited as Areeda & Turner III).

14. The authors' list of instances in which conduct might be taken as sufficient proof of power includes tying arrangements, such as in *United States v. Loew's*, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); *Northern Pacific R.R. Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958), and practices illegal per se, such as horizontal price-fixing and market-sharing arrangements, as in *United States v. Socony-Vaccuum Oil Co.*, 310 U.S. 150, 224 n.59, 60 S.Ct. 811, 844 n.59, 84 L.Ed. 1129 (1940).

15. Dimmitt's graph suggests that CPC's list prices for corn syrup, for example, were the first down and the last up, belying CPC's claim that it was merely following competitors' price decreases.

that this conduct evidence alone is insufficient to overcome the presumption against monopoly power implied by CPC's indisputably low market shares in the two relevant undifferentiated products, corn syrup and cornstarch. Dimmitt's structural evidence is consistent with the proposition that the corn wet milling industry is only an oligopoly, with CPC as its price leader. If so, CPC's market power is dependent upon joint action by at least some of its rivals.[16] While we realize that any degree of market power tends to cause economic harm, such as high prices, low output, and underutilized capacity, an interpretation of the completed monopolization offense, to embrace *any* degree of market power, would complicate enforcement, overwhelm the enforcement machinery, and deter arguably legitimate conduct. *See* Areeda & Turner III, ¶ 813 at 300–02. We must therefore reverse the court's denial of CPC's motion for judgment n. o. v. on the completed monopolization claim.

Since in this case the jury found CPC guilty of the completed monopolization offense but not guilty of the attempt to monopolize, appellee asks us to render judgment in its favor. As in *United States v. Dunham Concrete Products, Inc.*, 501 F.2d 80, 84 (5th Cir. 1974), *cert. denied*, 421 U.S. 930, 95 S.Ct. 1656, 44 L.Ed.2d 87 (1975), "[w]e decline to construe the jury verdict as meaning the jury agreed on nothing or nonsense '. . . when a perfectly rational explanation for the jury's verdict, completely consistent with the jury's instructions, stares us in the face.'" *Quoting Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972). To construe the jury verdict in the manner urged by appellee would make nonsense of the proceedings below. As Areeda and Turner point out, "[t]o say that one who has monopolized has also attempted to monopolize is redundant and adds nothing to the scope of available remedies. The attempt is merged into the complete offense." Areeda & Turner III, ¶ 830(e) at 335. The jury in this case was presented with one, and only one, theory of monopolization—namely, that CPC by its own admission cut corn syrup and cornstarch prices in 1971 and 1972 in order to exclude competition. Appellant would have us believe that, although the jury found completed monopolization on this theory, it found that the different elements of proof for an attempt case were not met.

[8] The different elements of proof for a completed monopolization versus an attempt case were adequately conveyed to the jury here.[17] While cases involving both attempts and monopolization claims often fail to distinguish between the general intent element of actual monopolization and the specific intent requirement of the attempt claim, *see, e.g.*, Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L.Rev. 1121 (1973), in our circuit, however, the law is well established that the distinction between the two offenses is the specific intent requirement in attempt cases. *Sulmeyer v. Coca Cola Co.*, 515 F.2d at 850–51. In that case we quoted Justice Holmes in *Swift & Co. v. United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905):

> Intent is . . . essential to such an attempt [to monopolize]. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of

16. Thus, Hoyt's market data, *supra* slip op. at 3268–3269, at —— drafted when CPC was not the sole defendant, notes that "the corn wet milling industry is *highly concentrated* with *five firms* accounting for over 71% of industry capacity" and that low product prices were "caused by the predatory pricing practices of the Defendants." (emphasis added). The jury, however, found Dimmitt's evidence insufficient to prove either a price-fixing conspiracy under section 1, Sherman Act, or a conspiracy to monopolize under section 2.

17. Appellant does not claim error in the jury instructions. The jury's charge on § 2 reads, in pertinent part:

> *The relevant time period* means the period of time from December 1970 through January 1973 in which the Dimmitt corn wet milling plant was operated by plaintiffs. Evidence concerning occurrences before and after that period may be considered insofar as it bears on occurrences during the relevant time period.
>
> . . . .
>
> *Specific intent to monopolize* means the specific intent of defendant to control prices or to exclude competition in a relevant market.
>
> The following instructions pertain to specific antitrust violations alleged by plaintiffs.

nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen .... But when that intent and the consequent dangerous probability exists, [section 2] ... directs itself against that dangerous probability as well as against the completed result. (citation omitted). Although inquiry into whether Coca Cola had a reasonable probability of gaining a monopoly position was obviated by lack of evidence of specific

II, III, AND IV

MONOPOLIZATION, ATTEMPT TO MONOPOLIZE, AND CONSPIRACY TO MONOPOLIZE

Section 2 of the Sherman Act provides: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed [to have violated the law] ....

Three separate offenses are included within Section 2 of the Sherman Act: (1) monopolization; (2) attempt to monopolize; and (3) combination or conspiracy to monopolize. You are to consider separately the facts with regard to each alleged offense.

Monopolization and attempted monopolization are violations which are committed by a single person acting independently rather than through joint action with some other person. A conspiracy to monopolize requires joint action by two or more persons.

In considering whether defendant has violated Section 2 of the Sherman Act, you must first determine the relevant market, that is, the line of commerce which defendant has allegedly monopolized, attempted to monopolize, or conspired to monopolize. The relevant market consists of two parts: the geographic market and the product market. In other words, in order to identify a relevant market, you must consider the questions of what products are involved and where those products are sold.

The relevant geographic market is the United States.

The relevant product market is that market in which there is effective competition in the sale and distribution of particular commodities and persons actually do, or potentially may, compete in the conduct of their business operations. The market includes other products which may be substitutes for the product in question, if any such substitutes exist and if they are actually competitive with the products within the market.

The plaintiffs claim that there is a separate relevant product market consisting of the production and sale of cornstarch. Defendant contends that other products, such as tapioca starch and wheat starch, compete with corn starch and should be included within the same relevant product market. Plaintiffs also claim that there is a relevant product market consisting of the production and sale of corn syrup. Defendant contends that other products, such as dextrose, levulose (high fructose corn syrup), and sugar are substitutes for corn syrup, at least for certain customers.

Therefore, the Court instructs you that if plaintiffs fail to prove the existence of at least one of their claimed relevant product markets, then you may not find that defendant monopolized, attempted to monopolize, or conspired to monopolize trade in violation of Section 2 of the Sherman Act.

II

MONOPOLIZATION

Plaintiffs claim that defendant CPC has monopolized the relevant markets of corn starch and corn syrup in the United States, in violation of Section 2 of the Sherman Act.

The term "monopolize" means either to obtain or to maintain the power to control prices or exclude competition from a relevant market.

To find monopolization, it must appear that during the relevant time period:

(1) defendant possessed the power to stabilize or control prices or exclude competition;

(2) defendant knowingly and wilfully obtained, or maintained, the power to control prices or exclude competition from the relevant market of corn starch or corn syrup, or both; and

(3) defendant had the intent to exercise that power at that time.

Monopolization may be found to exist whenever it appears from a preponderance of the evidence that the three essential facts or conditions just stated have in fact occurred. It is not necessary that competitors actually be removed or excluded from the field before monopolization can be found.

III

ATTEMPT TO MONOPOLIZE

Plaintiffs claim that defendant CPC has attempted to monopolize the relevant markets of corn starch and corn syrup in the United States, in violation of Section 2 of the Sherman Act.

The term "attempt to monopolize" involves two essential elements: (1) a specific intent to monopolize, and (2) some predatory or anticompetitive act done in furtherance of that intent, even though insufficient actually to produce the intended monopolization. In order to find an attempt to monopolize, both elements—the intent and the act—must appear, and must together result in a dangerous probability that monopolization will sooner or later occur.

(emphasis in original).

intent in *Sulmeyer*, other authorities have addressed the point. While courts have often found market shares of ten percent or less inadequate to prove attempt, *see generally* Areeda & Turner III, ¶ 835(c) at 348–49; *Whitten v. Paddock Pool Builders*, 508 F.2d 547 (1st Cir. 1974) (three percent), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 297 (7th Cir. 1974) (three percent); *I. Haas Trucking Co. v. New York Fruit Auction Corp.*, 364 F.Supp. 868, 874–75 (S.D.N.Y.1973) (ten percent), market shares of twenty percent may raise attempt liability, depending on other characteristics of the market. Thus, in *Yoder Brothers*, 537 F.2d at 1368–69, we declined to find attempted monopolization in a case in which the defendant controlled 20 percent of the market but "[b]arriers to entry were low in the ornamental plant industry; conditions were highly competitive." *Compare United States v. Empire Gas Corp.*, 537 F.2d 296, 305–07 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 592 (1977) (showing a 47–50% market share alone not sufficient to show dangerous probability of success for attempt to monopolize claim); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982) (attempted monopolization found on the basis of anticompetitive conduct; company held 24% market share); *White & White, Inc. v. American Hospital Supply Corp.*, No. 79–633CA1 540 F.Supp. 951, (W.D.Mich.1982), *reported in* 42 Antitrust & Trade Reg. Rep. (BNA) No. 1062, at 884 (April 29, 1982) (purchasing agreement between a national manufacturer-distributor of medical-surgical supplies and group of hospitals found an unlawful attempt to monopolize in five of relevant markets; court applied 25% market share as minimum cutoff for attempt); *Lektro-Vend Corp. v. Vendo Corp.*, 403 F.Supp. 527, 533–34 (N.D.Ill.1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd on other grounds*, 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (company with 20% of market extracted broad noncompetition covenants; guilty of attempt to monopolize).[18]

[9] In this unusual case, the problem with Dimmitt's monopolization claim was not lack of evidence demonstrative of intent to monopolize but rather lack of structural evidence demonstrative of ability to do so. *Cf. Forro Precision, Inc. v. IBM Corp.*, *supra* (plaintiff failed to prove either dangerously high market power or intent to monopolize). Evidence of CPC's specific intent to monopolize, unmistakeably set forth in the company's internal memoranda, was the only basis for the jury's monopolization verdict. The jury could not have found in favor of CPC on attempt because of absence of proof of specific intent to monopolize.[19] Nor could it have conceivably found absence of a dangerous probability of monopolization given their finding that CPC had achieved monopoly. The only conceivable explanation for the jury's verdict is that given by Areeda and Turner III, ¶ 830(e) at 335—namely that the jury saw the attempt offense as redundant and unnecessary given its finding of the more serious violation. Having found in effect the defendant guilty of murder, the jury thought it inappropriate to find him guilty of attempted murder as well. In light of what the jury did in this case, the only remedy consistent with justice is to remand for a new trial on Dimmitt's attempt claim pursuant to our authority under Fed.R.Civ.P. 50(d). 5A

18. Relative to market share requisites for the completed monopolization offense, minimum market shares for the attempt offense are much more unsettled. We have already cautioned courts to be wary of the "numbers game of market percentage" when considering attempts. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969). *Compare* Areeda & Turner III, ¶ 835 at 350 (advancing some tentative, possibly "illusory" rules of thumb on minimum market shares for the attempt offense).

Neither is the requisite of proof of dangerous probability of monopolization as secure as it once was. The Ninth Circuit has departed altogether from the rule, relying entirely on proof of specific intent to monopolize. *See, e.g., Forro Precision, Inc. v. IBM Corp.*, *supra*. Areeda & Turner would adopt a "limited per se" rule for attempt in cases involving "per se" illegal conduct, *e.g.*, fraudulent procurements of invalid patents (as in *Walker Process Equipment v. Food Machines & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965)) and predatory pricing. Areeda & Turner III, ¶ 836 at 352–55.

19. It is, of course, well established that price cutting as a tool to eliminate competition may violate § 2. *See, e.g., Corn Products.* And even CPC admits in its appellate brief that the memoranda evidence presented by Dimmitt "if accepted at face value, might be relevant to show an intent to monopolize in an attempt case under section 2 ...."

Moore's Federal Practice, ¶ 50.15 (2d ed. 1982).[20] At the new trial, the jury will be given the opportunity to determine whether, although CPC's relevant market shares were inadequate to constitute achieved monopoly power, they were, together with the other structural and conduct evidence, sufficient to constitute a dangerous probability of monopolization.[21]

REVERSED AND REMANDED.

ON SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

In view of the tone and content of Appellant's Suggestion for Rehearing En Banc, we direct its attention to Rule 50(d), Federal Rules of Civil Procedure and the comment thereon by the Advisory Committee on 1963 Amendments to Rules, reading in pertinent part as follows:

> Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n. o. v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ronald D. LEON and Joe Dee Hicks, Defendants-Appellants.

No. 81-1319
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

July 2, 1982.

Defendants were convicted before the United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., of conspiring to acquire, transfer and distribute cocaine, with one defendant also convicted of using a telephone to commit a conspiracy, and defendants ap-

20. Note that we are not saying that all monopolization offenses must necessarily involve an attempt offense. They may well be cases in which a plaintiff succeeds in demonstrating a general intent to monopolize for the completed monopolization claim but fails to prove overt acts demonstrative of specific intent sufficient to carry an attempt claim. This case, however, is not one of those.

21. We reserve for another day one question raised by the litigants—whether proof of market power is unnecessary when the antitrust plaintiff demonstrates predatory pricing. There are authorities that would regard this as analogous to a "per se" attempt offense. *See, e.g., Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir.), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978) (proof of predatory conduct can in some circumstances permit inferences of specific intent and dangerous probability of success); Areeda & Turner III, ¶ 836(b) at 352–55. At trial Dimmitt attempted to prove that CPC dumped its cornstarch and corn syrup prices below both its total and average variable costs for sustained periods. The issue of whether the plaintiff here demonstrated predatory pricing by CPC, joined with the troubling question of whether there are categories of conduct—such as predatory pricing—that constitute unlawful § 2 attempts with little or no proof of defendant's market power may be the subject of a second appeal in this case. They are questions that, at the outset, should be resolved by the trial court on remand. We find, with some relief, that they are at present not ripe for our review.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 80-2065

D. C. Docket No. CA 2 74 144 (Consolidated in D.C. wi
CA 2 75 41)

DIMMITT AGRI INDUSTRIES, INC.,
a Texas Corporation,
Plaintiff-Appellee,

versus

CPC INTERNATIONAL, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas

Before GEE, RUBIN and GARZA, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

July 2, 1982

Issued as Mandate:

DIMMITT AGRI INDUSTRIES, INC., a Texas Corporation, Plaintiff-Appellee,

v.

CPC INTERNATIONAL, INC., Defendant-Appellant.

No. 80-2065.

United States Court of Appeals, Fifth Circuit.

Oct. 12, 1982.

Appeal from the United States District Court for the Northern District of Texas.

ON SUGGESTION FOR REHEARING EN BANC

679 F.2d 516 (5th Cir., 1982).

Before GEE, RUBIN and GARZA, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

In view of the tone and content of Appellant's Suggestion for Rehearing En Banc, we direct its attention to Rule 50(d), Federal Rules of Civil Procedure and the comment thereon by the Advisory Committee on 1963 Amendments to Rules, reading in pertinent part as follows:

> Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had.

82-1169

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CPC INTERNATIONAL INC.,

Petitioner

v.

DIMMITT AGRI INDUSTRIES, INC.,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

OPINION OF THE
UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT
JULY 2, 1982

516

DIMMITT AGRI INDUSTRIES, INC., a Texas corporation, Plaintiff-Appellee,

v.

CPC INTERNATIONAL INC., Defendant-Appellant.

No. 80-2065.

United States Court of Appeals, Fifth Circuit.

July 2, 1982.

Opinion on Denial of Rehearing and Rehearing En Banc Oct. 12, 1982.

Farmers' cooperative engaged in the manufacture of corn starch and corn syrup brought antitrust suit against corn starch and corn syrup manufacturer. The United States District Court for the Northern District of Texas, Mary Lou Robinson, J., denied defendant's motion for judgment n. o. v., after jury verdict of monopolization under the Sherman Act, and defendant appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) evidence that defendant exercised a significant degree of control over price in the national corn syrup and corn starch market was insufficient to overcome the presumption against monopoly power implied by defendant's maximum

possible market shares of 25% and 17% for the national corn starch and national corn syrup markets respectively, and thus defendant could not be found to have committed completed monopolization offense under section 2 of the Sherman Act, and (2) where only conceivable explanation for jury's verdict finding defendant guilty of monopolization but not guilty of attempt to monopolize was that jury saw the attempt offense as unnecessary given its finding of the more serious violation, and where jury's verdict finding defendant guilty of completed monopolization offense was reversed, the only remedy consistent with justice was to remand for a new trial on the attempt claim.

Reversed and remanded.

Petition for panel rehearing denied.

1. Federal Courts ⇐643

Contention in defendant's motion for directed verdict, that there was no evidence

517 that defendant possessed monopoly power in any relevant market, was sufficient to preserve for appeal defendant's contention that defendant, with a market share of no more than 21%, could not, as a matter of law, have monopoly power. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

2. Monopolies ⇐12(1.3)

Monopoly power is the power to control price or exclude competition. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

3. Monopolies ⇐12(1.3)

The essence of completed monopolization offense under section 2 of the Sherman Act involves two elements, capacity and deliberateness; the section 2 plaintiff must demonstrate possession of monopoly power in relevant market and willful acquisition

or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

4. Monopolies ⇐12(1.3)

The attempted monopolization offense has two elements: specific intent to accomplish illegal result, and dangerous probability that the attempts will be successful. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

5. Monopolies ⇐28(7.1)

A plaintiff under section 2 of the Sherman Act attempting to prove either completed monopolization or attempt must provide jury with sufficient evidence to permit it to define the relevant geographic and product market. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

6. Monopolies ⇐12(1.3)

Proof of relevant market in attempt cases under section 2 of the Sherman Act is required in connection with the dangerous probability of success element of the attempt offense; thus, courts often state the dangerous probability and relevant market requisites as one combined requirement of establishing a dangerous probability of monopolization in any relevant market. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

7. Monopolies ⇐28(7.1)

Evidence that defendant exercised a significant degree of control over price in the national corn syrup and corn starch market was insufficient to overcome the presumption against monopoly power implied by defendant's maximum possible market shares of 25% and 17% for the na-

tional corn starch and national corn syrup markets respectively, and thus defendant could not be found to have committed the completed monopolization offense under section 2 of the Sherman Act. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

8. Monopolies ⇐12(1.6)

A distinction between an actual monopolization claim and an attempt claim is the specific intent requirement in attempt cases. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

9. Federal Courts ⇐937, 943

Where only conceivable explanation for jury's verdict finding defendant guilty of monopolization but not guilty of attempt to monopolize was that jury saw the attempt offense as redundant and unnecessary given its finding of the more serious violation, and where jury's verdict finding defendant guilty of completed monopolization offense was reversed, the only remedy consistent with justice was to remand for a new trial on attempt claim; at the new trial, jury would be given opportunity to determine whether, although defendant's relevant market shares were inadequate to constitute achieved monopoly power, they were sufficient to constitute a dangerous probability of monopolization. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

Baker & Botts, Theodore F. Weiss, Jr., Robert J. Malinak, Houston, Tex., for defendant-appellant.

Witherspoon, Aikin & Langley, James Witherspoon, Hereford, Tex., Joseph M. Alioto, Lawrence Appel, San Francisco, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Texas.

518 Before GEE, RUBIN and GARZA, Circuit Judges.

GEE, Circuit Judge:

This is an appeal from the district court's denial of the defendant's motion for judgment n. o. v. after a jury verdict of monopolization under the Sherman Act. Because we find that the section 2 monopolization verdict cannot, as a matter of law, stand, we reverse and remand for a new trial.

Sixty-six years ago, the United States charged a defendant, Corn Products Refining Company, with combining illegally in restraint of trade and monopolizing in violation of sections 1 and 2 of the Sherman Act.[1] Then District Judge Learned Hand, in an opinion long familiar to students of antitrust law, *United States v. Corn Products Refining Co.*, 234 F. 964 (S.D.N.Y. 1916), *appeal dism'd*, 249 U.S. 621, 39 S.Ct. 291, 63 L.Ed. 805 (1919) (hereinafter cited as *Corn Products*), found the defendant guilty of the various antitrust offenses alleged. Specifically, the court found that the defendant had combined into an organization that conspired to monopolize and restrict commerce in the manufacture and sale of starch, glucose, grape sugar, and various syrups by, inter alia, agreeing to sell the various products at unreasonably low fixed prices, thereby preventing new competitors from entering the field and driving out those already engaged in the business. The evidence of monopolizing intent presented to the court consisted of internal memoranda by the officers of the defendant company, acknowledging their

belief that Corn Products Refining "had entire control over the price at which the product should be sold." *Id.* at 992. The court had this to say about the nature of such evidence:

> The officers of the Corn Products Refining Company apparently had a custom of communicating with each other by typewritten, unsigned memoranda. Apparently it was often difficult for them to interview each other personally, and the affairs of the company were discussed between them by means of these memoranda with the utmost frankness. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served to affect the general credibility of his testimony. In the face of these memoranda, which for some strange reason were preserved, there can be no question in my mind of the continuous and deliberate purpose of the Corn Products Refining Company, by every device which their ingenuity could discover to maintain as completely as possible their original domination of the industry. That they recognized the impossibility of an absolute exclusion of other glucose and starch manufacturers is true enough, for they were minutely advised as to all conditions of the industry. But, while recognizing this inability, they in no wise conceded among themselves that their conduct could not

have, and should not have, a depressing influence upon the growth of any competition. In considering the various devices adopted for that purpose, I shall paraphrase the memoranda in detail; but at the outset it is important to remember

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> that permeating the whole of their conduct, certainly down to the year 1912, there runs the intent which I have mentioned, an intent the execution of which it is the precise purpose of the anti-trust act to foil.

Id. at 978.

Despite the passage of time (or perhaps because of it), the officers of Corn Products Refining, now CPC International Inc. ("CPC"), have not learned the perils of incriminating internal memoranda. Students of antitrust law may consequently be excused a feeling of déjà vu upon reading the facts in this case. This appeal grows out of a jury verdict finding section 2 Sherman Act monopolization in a private antitrust suit by Dimmitt Agri Industries, Inc. ("Dimmitt") against CPC. Dimmitt is a farmers' cooperative that constructed a corn wet milling plant in the Texas panhandle and, in late 1970, commenced the manufacture of cornstarch and, later, corn syrup. CPC, a Delaware corporation headquartered in New Jersey with production plants in various foreign countries, is the largest producer in the national corn wet milling market. In late 1972, Dimmitt was allegedly "forced out" of the corn wet milling market, and Amstar Corporation, the nation's largest sugar producer, took over operation of Dimmitt's plant in 1973. In 1974, Dimmitt sued CPC and others in the corn wet milling industry. All defendants except

CPC settled before trial. Dimmitt's allegations and causes of action against CPC are similar to those involved in the 1916 case discussed above. Dimmitt alleged five antitrust theories: (1) a price-fixing conspiracy under section 1, Sherman Act; (2) conspiracy to monopolize, (3) attempt to monopolize, (4) monopolization, all under section 2, Sherman Act; and (5) illegal price discrimination under the Robinson-Patman Act.

The factual record, developed in the course of an eight-week trial before a jury, was extensive. Thousands of pages of documentary exhibits were introduced, and 35 witnesses testified, either personally or by deposition. Despite the nearly 6,000-page transcript of proceedings, the underlying theory of plaintiff Dimmitt's case was straightforward and strikingly similar to that of the 1916 proceeding: essentially, Dimmitt alleged that CPC fixed unreasonably low prices in order to exclude competition, especially Dimmitt, from the national markets for cornstarch and corn syrup. Like the government in 1916, Dimmitt purported to demonstrate its case through the defendant's own incriminating internal memoranda, and, as in the earlier proceeding, the tactic proved ultimately successful. The case was submitted to the jury on special interrogatories on all five antitrust theories.[2] The jury found for CPC on all theories except the crucial monopolization claim. It found that "during the relevant

520 time period, the defendant CPC monopolized a relevant market in violation of Section 2 of the Sherman Act" and that this violation was a proximate cause of injury to Dimmitt's business. The court trebled the damages awarded by the jury and added

attorneys' fees. Judgment for Dimmitt was entered for $5.3 million.

CPC's appeal focuses on one crucial distinction between the 1916 proceeding and the litigation here. Much of that earlier case was devoted to evidence of the market share in the glucose and starch trade controlled by Corn Products Refining Company.[3] In the proceedings under review here, the parties did not focus on market share.

521 The limited amount of documentary evidence presented suggests that during 1971 and 1972, the time period in which Dimmitt was competing in the corn wet milling industry, CPC's maximum possible market shares in the narrowest markets alleged by Dimmitt were: 25 percent in the national cornstarch market and 17 percent in the national corn syrup market. The narrow issue presented for our review, as stated in defendant's judgment n. o. v. motion, is whether a defendant with such a low market share can, "as a matter of law, have monopoly power, the essential prerequisite for a jury finding of monopolization."

I. PROPERLY RAISED?

[1] At the outset, we are met by Dimmitt's contention that CPC's "market share" argument is not properly before us because it was not raised in CPC's earlier motion for directed verdict. Under Fed.R. Civ.P. 50(a), "[a] motion for directed verdict shall state the specific grounds therefor." If a motion for directed verdict is denied, a party may move within ten days after entry of judgment "to have the verdict in any judgment entered thereon set aside and to have judgment entered *in accordance with his motion for a directed verdict* ...."

Fed.R.Civ.P. 50(b) (emphasis added). The law on point is well established:

> A motion for judgment notwithstanding the verdict, like a motion for directed verdict, must state the grounds on which it was made. Since it is technically only a renewal of the motion for directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for a directed verdict.

Wright & Miller, *Federal Practice & Procedure: Civil* § 2537 (1971) (footnotes omitted). *Accord Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976); *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 67–68 (5th Cir. 1972).

In this case, CPC's motion for directed verdict alleged, inter alia, that: "with respect to monopolization there is no evidence that CPC possessed monopoly power in any relevant market, much less that CPC deliberately acquired or maintained such power." CPC's subsequent j. n. o. v. motion is, in our view, only a more detailed version of this "no evidence of monopoly power" ground for vacating the verdict. CPC's motion for j. n. o. v. stated, inter alia:

> A defendant with a market share of no more than 21 percent cannot, as a matter of law, have monopoly power, the essential prerequisite for a jury finding of monopolization. In other words, whatever other evidence of monopoly a plaintiff may have, a defendant cannot possibly, as a matter of law, "control prices or exclude competition" if its market share is as low as CPC's position in this case.

It requires no great familiarity with the law of antitrust to know that evidence of a defendant's market share is the principal tool used by courts to determine the existence of monopoly power. While a j. n. o. v. motion may not enlarge or assert new matters not presented in the motion for directed verdict, "technical precision is not necessary in stating the grounds for the motion [for directed verdict] so long as the trial court is aware of the movant's position." *United States v. Fenix & Scisson, Inc.*, 360 F.2d 260, 266 (10th Cir. 1966), *cert. denied*, 386 U.S. 1036, 87 S.Ct. 1474, 18 L.Ed.2d 599 (1967). Here there is no doubt that the trial court was aware of the movant's position, since CPC raised its market share contention in its objections to the jury charge. The rationale for the rule that a motion for j. n. o. v. cannot assert a ground not included in a motion for directed verdict is obviously to avoid "ambushing" the trial court and opposing counsel. *Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018, 1025 (5th Cir. 1979). Since no such "sandbagging" was possible here, we conclude that

522 the merits of CPC's contentions on appeal are open for our review.

II. EVIDENCE OF MONOPOLIZATION.

Dimmitt's monopolization case against CPC was built around a series of CPC memoranda, many of which were stamped "confidential" and were between the highest corporate officials of that company. According to Dimmitt's theory of the case, CPC was, during the period 1970–72, "able to maintain and exercise the ability to control prices in and exclude competition from the cornstarch and corn syrup markets."

CPC, burdened with generally outmoded physical plants, was, according to a 1970 memorandum by its president, concerned with the possibility of competition by modernized cooperatives. These cooperatives, free of the burdens of some of the taxes faced by ordinary industrial concerns, could, CPC feared, produce a "higher quality product at lower cost." According to Dimmitt, its completely automated plant in the Texas panhandle was the main object of CPC's concern. Thus, in 1968 Plimpton, then president of CPC, sought to "kill" the Dimmitt project by "spread[ing] the word that we would certainly consider reducing our price as much as 50–75 cents per cwt. to defend this market [paper industry, starch market on the West Coast]." This threatened price cut was discussed when CPC visited International Paper, a potential Dimmitt customer for cornstarch, and announced that CPC would "probably assume pricing leadership in the starch market in the near future." Thereafter, coincidentally on December 1, 1970—the anticipated date of Dimmitt's market entry—CPC announced a new pricing policy for its mill-grade starch. Under this new "spot pricing," with an avowed purpose of stabilizing prices, CPC would no longer attempt to relate its cornstarch prices strictly to market fluctuations in the price of corn. At the same time, CPC lowered its cornstarch prices sold to the paper trade by a full 75 cents per hundredweight (cwt). By September 1971, apparently concerned with the threat of other farmer cooperatives following Dimmitt's lead, CPC memoranda were frankly acknowledging the need to "plan the marketing attack in order to discourage competitors from constructing new plants."

In December 1971, the "CPC International Industrial Division Strategy Report" stated that CPC would "control competitors' share of market," "maintain position as the recognized price leader of the industry," and that, as a matter of policy:

> Price will be used primarily as a tool to reach or to maintain market share goals and to control and influence competitors' investment and growth. Price strategies will be directed toward long-term strength of position as a clear priority over short-term profitability.

According to CPC itself, the cornstarch "spot pricing" program "allows upsetting or stabilization of the market place at our discretion." The losses incurred as a result of the reduction in spot-grade starch prices were acknowledged in later CPC memoranda, along with assumed consequent difficulties for smaller competitors. Despite these losses and the then-soaring corn costs, by November 1971 CPC had cut its April 1971 price by a full $1.25 per hundredweight.

Dimmitt's memoranda evidence presents a similar scenario in the corn syrup market. Again CPC memoranda repeatedly refer to "price leadership" and "stabilization" of the corn syrup market. The thrust of Dimmitt's case was convincingly built around CPC memoranda that described its intentions in unmistakeable terms:

> The purpose of stabilizing the corn syrup market is admirable .... [S]everal years ago this same approach was tried and CPC reduced and market price of corn syrup to $4.00 base. All competitors promptly followed but we did not stay with the idea more than a few weeks when we began to raise prices again. This was the mistake.

* * * * * *

If we accept the new plan we must realize that we can go into a negative profit situation for an extended period of time .... I am sure that all competition will announce new market policies within a few hours after our announcement.

• • • • • •

523 Mr. Fox's plan to establish pricing leadership and to stabilize the corn syrup market is a noble one indeed .... How low would we have to go to reach bottom? $4.00 to $4.50/cwt. which would be difficult in that our competitors have newer equipment with higher efficiency and lower selling costs.

• • • • • •

In theory and principle I agree with your proposal to establish pricing leadership and to stabilize the corn syrup market. As long as there is excess production and we continue our present policy of meeting competition, we will continue to be "whip sawed" by both competitors and buyers with the result of much lower margins and the survival of the fittest.... What I am saying is that once we start on this program, we must be prepared to go substantially lower before our competitors and customers fully understand that we are determined to be the price leader. If all levels of management are not willing to accept the consequences and pay the price then I think it would be advisable to use a different approach.... How far to "bottom"—I don't know but the saying "water seeks its own level" could be true in this case with the syrup producers taking a real bath before the desired discipline is reached.

Shortly after Dimmitt began production of corn syrup, CPC lowered its corn syrup prices. Eventually the corn syrup price went from $6.05 per cwt. to $3.40 per cwt., a price that, at least according to Dimmitt's expert, was below CPC's total and average variable costs.

Dimmitt produced other evidence of CPC's pricing strategy, including testimony by competitors that they regarded CPC as the price leader. The memoranda evidence of 1972, including one memo of November 6, 1972, after the CPC leadership learned that the Dimmitt plant had been taken over by Amstar, supports the view that at least the CPC leadership believed that its price strategy was successfully excluding competition from the market. Dimmitt's post-November 1972 memoranda evidence was especially damning to CPC's case. Thus, CPC's "corn syrup pricing program," announced November 1, 1972, stated:

> OBJECTIVES
>
> Provide leadership to market by (1) establishing a "climate" conducive to following CPC, and (2) setting a pricing pattern that can be easily understood, followed and monitored.
>
> Establish climate by recognizing realistic base price.
>
> Pre-announced price for specified periods.
>
> Deterrent to not following is implied; return to November-December levels if we are undercut.
>
> Lead industry to more reasonable returns, and prevent extended price commitments and/or confusion that preclude the opportunity for increases during capacity season (June-October).

Obtain for CPC the price leadership rewards of timing and the setting of price levels.

IMPLEMENTATION

1. Immediately announce "period" pricing per attached ($3.40/cwt. day to day) effective November 1, 1972.

. . . .

3. In approximately ten days announce price for period January ($3.80 per cwt.). Drop if necessary to maintain orderly market (and share).

4. Price in one or two month periods, aiming toward $4.75/cwt. period price for tight supply/high volume months (June-October).

ALTERNATIVES CONSIDERED

. . . .

3. Do nothing at this time. Rejected because competitors are anxious to know CPC's position and are looking to CPC to set 1973 tone. If we don't move, current $3.40 prices will start being extended into 1973.

This announcement of policy preceded a price increase in corn syrup that, in the eyes of CPC, was "being followed by the other suppliers."

524 Dimmitt's case culminates with a March 21, 1973, report by Eiszner, president and chief operating officer of CPC, to CPC's board of directors:

> As you recall, we finally brought [corn syrup] prices down to the $3.40 per cwt. level [in 1972] in an effort to convey the message to the industry that we were no longer going to give up market share to competitors who cut price. Our sales

plan for 1973, simply stated, was to re-establish our leadership position in corn syrup, to gradually increase prices as long as there was no sign of price cutting....

To set the scene for this 1973 marketing plan, we raised the price of corn syrup in December 1972, from $3.40 to $3.80 per cwt. The industry followed our pattern. No one played price cutter, and we held market share. On February 1 of this year, we again raised corn syrup prices to $4.30 per cwt. The industry followed, nobody shaded the price, and we held market share.

Staley, Cargill, Corn Sweeteners, all have announced price increases to $4.65, to take effect March 30 of this year. We are following. Our plan is to either lead or follow price advances, up to the level at which new investment becomes economic. We will keep the price just below the new investment level until we are sold out. In the event anyone undercuts the list price, I have instructed our people to reduce prices, promptly and severely.

There was a major celebration in our shop in February, when the product manager for corn syrup announced that we had a 27 cents per cwt. gross margin on corn syrup—the first time the number had been in the black in a year. Gentlemen, we are making progress.

In view of the incriminating nature of the memoranda evidence presented, Dimmitt can, with some justice, claim to have presented one of the clearest conduct evidence cases supportive of a monopolizing intent that has been presented to a court, possibly since *Corn Products* itself. Antitrust cases in which the plaintiff elicits

admissions by the alleged monopolist that the company was out to exclude other competitors from the market are rare.[4] As in *Corn Products*, CPC's defense at trial to the monopolization claim was to attempt to cast its memorandum statements in a different light.

Especially through the testimony of Eiszner, CPC attempted to prove that it was, during all relevant times, simply trying to compete, "fair and square," with all of its competitors, including Dimmitt, in the midst of a ferocious price war. Accordingly, Eiszner testified that his pricing policies and motives had nothing to do with Dimmitt, that CPC's spot-price policy was a nonsinister method of changing the price of the product without regard to the cost of corn adopted in order to compete with larger producers unwilling to follow CPC's price decline, and that the various pricing strategies discussed by CPC executives involving Dimmitt and other potential farmer cooperatives were simply "what if" hypotheses that were never put into effect. In general, CPC witnesses testified that their motives throughout were simply to hold onto their own market share and that CPC was compelled by competitors and overproduction in the industry to take prices down. In addition, CPC attempted to portray Dimmitt's entry into the market as a poorly conceived move, doomed to failure from the start as the small company found itself in the midst of a highly competitive market "fueled by overcapacity in the industry."

525 Since most of Dimmitt's evidence consisted of memoranda among highly placed CPC personnel, CPC's closing argument to the jury was understandably pitched at the

credibility of its witnesses, all of whom tried to distance themselves from their memoranda statements. Counsel for CPC thus attempted to make the case turn on the jury's view of the credibility of Eiszner:

> They are still out there in the market place fighting for their lives, and they are competing. They are competitors. And if you don't—if you think that Jim Eiszner is a price fixer, so be it.
>
> You saw him. Do you think Jim Eiszner is a price fixer? That's your question to answer. Do you think Jim Eiszner is a monopolist? That's your question to answer. Do you think he attempted to monopolize? Do you think he attempted to discriminate against prices to get Dimmitt?

As in *Corn Products*, testimony by company executives attempting to contradict their memoranda statements "only served to affect the general credibility of [their] testimony." 234 F. at 978. The jury chose to believe the evidence of the memoranda, as interpreted by Dimmitt, over the live testimony of Eiszner at trial and found CPC guilty of monopolization.

On appeal, Dimmitt's theory of the case remains unchanged, but appellant CPC raises a proposition largely ignored in the proceedings below: assuming the CPC memoranda proved the company's monopolizing intent, did Dimmitt nonetheless present sufficient evidence, or indeed any evidence, that CPC actually possessed monopoly power in either the national corn syrup or national cornstarch markets during 1971–72? In short, was there any evidence presented to the jury to demonstrate that, regardless

of the assumptions held by CPC management about their power to control prices and exclude competitors, CPC in reality possessed monopoly power during this period? This is the sole issue presented to us for review.

III. THE LAW AGAINST SECTION 2 MONOPOLIZATION.

[2–6] Monopoly power is "the power to control price or exclude competition." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1004, 100 L.Ed. 1264 (1956). The essence of the completed monopolization offense under section 2 involves two elements: capacity and deliberateness. The section 2 plaintiff must demonstrate "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71, 86 S.Ct. 1698, 1703–04, 16 L.Ed.2d 778 (1966); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1304 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). The attempt offense also has two elements: "(1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful." *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied*, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979). In our court a section 2 plaintiff attempting to prove either completed monopolization or attempt must provide the jury with sufficient evidence to permit it to define the

relevant geographic and product market. *Id.* at 276, 284–86; *In re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436, 441 (5th Cir. 1982). The rule requiring proof of relevant market has been recognized by the Supreme Court. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L.Ed.2d 247 (1965). Proof of the relevant market in attempt cases is required in connection with the dangerous probability of success element of the attempt offense. Thus, courts often state the "dangerous probability" and "relevant market" requisites as one combined requirement of "establishing a dangerous probability of monopolization in a relevant market."

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Annot., 27 A.L.R.Fed. 762, 768 (1976); *Spectrofuge*, 575 F.2d at 286.[5]

This court's insistence on proof of a relevant market is an outgrowth of the structural analysis, dependent on a showing of high market share in a relevant geographic-product market that has been consistently applied to monopoly cases since *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (hereinafter cited as *Alcoa*). Ever since this case, the most heavily contested issues in monopoly cases have typically revolved around the definition of relevant geographic or product market. Appellant here argues that demonstration of a high market share has now become the *exclusive* way of proving the completed monopolization offense. We find appellant's argument unnecessarily overbroad.

Structural analysis, along with the notion that a 90 percent or higher market share in a relevant market creates a presumption of

monopolization was developed in *Alcoa* as a shortcut formula to demonstrate power to control prices or exclude competition. The early monopolization cases were not as concerned with high market share but dealt with monopolization claims on the basis of predatory exercise of market power.[6] The government in early cases, such as *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911); *United States v. American Can Co.*, 230 F. 859 (D.Md.1916), *appeal dism'd*, 256 U.S. 706, 41 S.Ct. 624, 65 L.Ed. 1181 (1921), attempted to demonstrate the actual exercise of market power to control prices or exclude competitors. The completed monopolization offenses in these early cases were largely based on what today we would call conduct analysis. These early cases viewed, for example, tortious attacks or threats on property, discriminatory price cutting, and sales by a vertically integrated firm at excessively high prices as predatory prices evidencing both elements of the completed monopolization section 2 offense. The modern cases do not explicitly overrule these early cases' approach; structural analysis, because it is "more objective" and easier to demonstrate, has merely displaced conduct analysis in proving the first element of the section 2 offense.[7]

Contrary to the appellant's contentions, this case is not one in which there was insufficient evidence of relevant market presented such as to be in violation of our rule in *Spectrofuge*.[8] In these proceedings

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there was compliance with our circuit's rule to provide sufficient evidence to define a

relevant geographic and product market. The geographic market, national in scope, was the subject of stipulation by the parties. The relevant product market was a "contested fact issue" at trial, and Dimmitt unsuccessfully attempted to present certain evidence of CPC's alleged power in the levulose market as well as in the corn syrup and cornstarch markets. The court, however, excluded evidence pertaining to the levulose market, and Dimmitt's entire case thereafter focused on CPC's actions in the corn syrup and cornstarch markets and these actions' effects on Dimmitt's sale of corn syrup and cornstarch products. Hoyt, Dimmitt's consulting economist, testified as to the nature of these markets during the relevant years, and Dimmitt's memorandum evidence strongly indicates that CPC executives regarded their corn syrup and cornstarch products as recognizably distinct national markets. In addition, minutes of a September 1971 meeting of the "industrial council," as well as the testimony of Eiszner himself, presented the jury with evidence as to CPC's market shares in these two markets in 1971–72.[9]

This is not a case, therefore, in which a jury was asked to find monopolization on the basis of conduct evidence alone. We therefore do not attempt to resolve the issue of whether, after *Alcoa* and its progeny, conduct analysis (e.g., evidence of a company's predatory acts on competitors), *in the absence of any evidence of high market shares*, can ever make out a monopoly case. The question here is narrower: can conduct evidence, belied by undisputedly low market shares in the relevant markets, make out a completed monopolization offense?[10]

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On appeal, Dimmitt does not challenge CPC's claim that during 1971 and 1972 its maximum possible market shares were 25 percent and 17 percent for the national cornstarch and national corn syrup markets respectively. Neither can we find, based on the evidence presented, as well as that excluded by the trial court, that the jury here could have had any relevant market in mind other than the national cornstarch and corn syrup markets. Dimmitt produced little, however, in the way of additional structural evidence at trial. Its economic expert Hoyt's testimony was limited; his analysis led him to the following rather general conclusions:

1. That the corn wet milling industry is highly concentrated with five firms accounting for over 71% of industry capacity.

2. That the demand for cornstarch and corn syrup is price inelastic.

3. That there are few if any substitutes for cornstarch and corn syrup.

4. That Dimmitt had an absolute cost advantage technologically, and thus was able to overcome the typical barriers to entry.

5. That there has been a consistent and predictable growth in demand for cornstarch and corn syrup over time and that this demand has equalled or exceeded increasing industry capacity.

6. That the product prices for cornstarch and corn syrup were inordinately low in 1971 and 1972 while Dimmitt was in business, and that those low prices cannot be explained statistically.

7. That the low product prices for cornstarch and corn syrup were not the

result of normal economic and market forces, but, rather, were caused by the predatory pricing practices of the Defendants.

8. That the fixed and variable cost coefficients projected by Dimmitt were accurate and realistic, even under the adverse anticompetitive activity of the Defendants, and would have resulted in substantial long-run profits had it not been for the Defendants' successful attempt to illegally block Dimmitt's entry.

9. That the Defendants possessed the necessary market power, which was overtly displayed in order to exclude new competition from the corn wet milling industry....

Dimmitt is thus asking us to uphold a jury verdict of monopolization on the basis of structural evidence essentially limited to some very bare and very low percentage figures. Dimmitt does not present a structural explanation to compensate for the inordinately low market shares of its alleged monopolist. *Compare, e.g.*, plaintiff's explanation in *Fulton, supra* note 10. Dimmitt presents little to demonstrate that despite its undisputedly low market shares, CPC was structurally capable of maintaining anticompetitive low prices for a sustained period of time. Dimmitt cannot cite us to any case in which monopolization was found on the basis of such meager evidence and despite undisputed proof of market shares significantly below 50 percent. Indeed, our review of the case law suggests that no such case exists.[11]

529 Moreover, there is considerable support for the proposition that low market shares, if undisputed, make monopolization an im-

possibility as a matter of law. In *United States v. United States Steel Corp.*, 251 U.S. 417, 40 S.Ct. 293, 64 L.Ed. 343 (1920), the Supreme Court suggested that market power should not be equated with monopoly power. It refused to find monopoly despite a market share of 50 percent and stated that "[t]he power attained was much greater than that possessed by any one competitor—it was not greater than that possessed by all of them. Monopoly was therefore not achieved . . . ." *Id.* at 444–45, 40 S.Ct. at 296–97. And in *Alcoa*, an opinion later cited by the Supreme Court as being tantamount to a Supreme Court decision, *see American Tobacco Co. v. United States*, 328 U.S. 781, 811–14, 66 S.Ct. 1125, 1139–41, 90 L.Ed. 1575 (1946), the Second Circuit, through Judge Learned Hand, stated that while a 90 percent market share was enough to constitute monopolization, "it is doubtful whether 60 or 64 percent would be enough; and certainly, 33 percent is not." 148 F.2d at 424.

Three of our recent decisions also compel the conclusion that market shares in the range of 16 to 25 percent, such as those held by CPC, are insufficient—at least absent other compelling structural evidence—as a matter of law to support monopolization. In *American Telephone & Telegraph Co. v. Delta Communications Corp.*, 408 F.Supp. 1075 (S.D.Miss.1976), *aff'd per curiam*, 579 F.2d 972 (5th Cir. 1978) (adopting district court opinion), *modified on other grounds*, 590 F.2d 100 (5th Cir. 1979), the district court granted summary judgment on a counterclaim filed by Delta against the three major television networks. Delta, a UHF Mississippi television station, alleged that "the networks together monopolized the television industry." 408 F.Supp. at 1106. Granting summary judgment for the networks, the court stated:

> Courts often have struggled with what percentage of market domination constitutes monopoly influence.... Possessing as they do significantly less than 50 percent of the network business, none of the network counterdefendants has the necessary market domination to be susceptible, individually, of being found to be a monopolist.

Id. (citations omitted). In *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1386 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977), we held that: "Because the correct product market was ornamental plants, and Yoder's share of that market was approximately 20 percent, ... as a matter of law Yoder could not have been guilty of monopolization." Finally, in *Sulmeyer v. Coca Cola Co.*, 515 F.2d 835, 850 (5th Cir. 1975), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 341 (1976), we concluded that Coca Cola's 22 percent market share of all independent bottlers was "an insignificant market share to establish monopolization in violation of section 2." [12]

530 Leading academic authorities support our conclusion. Thus Areeda and Turner ask, "What quantum of power is to be characterized as 'monopoly power' in the legal sense for purposes of section 2"—a question that assumes that not all exercises of market power violate the strictures of section 2. Areeda & Turner, *II Antitrust Law* ¶ 600 at 1 (1978) (hereinafter cited as Areeda & Turner II). The authors' discussion of *Alcoa, supra*, is instructive. They argue that while a high (90 percent) market share does not necessarily tell us the degree of market power possessed, a low market share significantly bears on power over price.

> A producer with, say, 30% of the market could raise price by restricting his output if his competitors could not expand theirs.

> To cut supply by 10%, however, he would have to cut his own output by one third, which could be offset by only a 14% increase in the output of competitors, which they might be able to effect without expansion of capacity.

Areeda & Turner II, ¶ 530 at 396. Section 2 is, according to the authors, directed at persistent market power. Transitory control over prices, ever present in a competitive economy—in large part due to lags in the responses of other buyers or producers—is not the subject of the completed monopolization offense.[13] For this reason, Areeda and Turner conclude that evidence of actual control over prices—conduct evidence—is inherently weak, giving

> no reliable clue to the degree of market power that the actor possesses, and he may even have none. Relatively slight economic advantages are typically worth the legal or other costs of protecting them.... Conduct, in short, will rarely if ever establish substantial market power. Where power is relevant to an antitrust defense, conduct can be taken as sufficient proof only where the power requirement itself is highly attenuated.

Id. ¶ 515 at 345.[14]

[7] We do not dispute Dimmitt's contention that its memoranda evidence, weighed with all reasonable inferences drawn in favor of the jury verdict, *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc), supports the conclusion that during 1971–72 CPC exercised a significant degree of control over price.[15] We conclude, however,

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that this conduct evidence alone is insufficient to overcome the presumption against monopoly power implied by CPC's indisputably low market shares in the two relevant undifferentiated products, corn syrup and cornstarch. Dimmitt's structural evidence is consistent with the proposition that the

corn wet milling industry is only an oligopoly, with CPC as its price leader. If so, CPC's market power is dependent upon joint action by at least some of its rivals.[16] While we realize that any degree of market power tends to cause economic harm, such as high prices, low output, and underutilized capacity, an interpretation of the completed monopolization offense, to embrace *any* degree of market power, would complicate enforcement, overwhelm the enforcement machinery, and deter arguably legitimate conduct. *See* Areeda & Turner III, ¶ 813 at 300–02. We must therefore reverse the court's denial of CPC's motion for judgment n. o. v. on the completed monopolization claim.

Since in this case the jury found CPC guilty of the completed monopolization offense but not guilty of the attempt to monopolize, appellee asks us to render judgment in its favor. As in *United States v. Dunham Concrete Products, Inc.*, 501 F.2d 80, 84 (5th Cir. 1974), *cert. denied*, 421 U.S. 930, 95 S.Ct. 1656, 44 L.Ed.2d 87 (1975), "[w]e decline to construe the jury verdict as meaning the jury agreed on nothing or nonsense '. . . when a perfectly rational explanation for the jury's verdict, completely consistent with the jury's instructions, stares us in the face.'" *Quoting Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 1059, 31 L.Ed.2d 340 (1972). To construe the jury verdict in the manner urged by appellee would make nonsense of the proceedings below. As Areeda and Turner point out, "[t]o say that one who has monopolized has also attempted to monopolize is redundant and adds nothing to the scope of available remedies. The attempt is merged into the complete offense." Areeda & Turner III, ¶ 830(e) at 335. The jury in this case was presented with one, and only one, theory of monopolization—namely, that CPC by its own admission cut corn

syrup and cornstarch prices in 1971 and 1972 in order to exclude competition. Appellant would have us believe that, although the jury found completed monopolization on this theory, it found that the different elements of proof for an attempt case were not met.

[8] The different elements of proof for a completed monopolization versus an attempt case were adequately conveyed to the jury here.[17] While cases involving both attempts and monopolization claims often fail to distinguish between the general intent element of actual monopolization and the specific intent requirement of the attempt claim, *see, e.g.*, Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 Cornell L.Rev. 1121 (1973), in our circuit, however, the law is well established that the distinction between the two offenses is the specific intent requirement in attempt cases. *Sulmeyer v. Coca Cola Co.*, 515 F.2d at 850–51. In that case we quoted Justice Holmes in *Swift & Co. v. United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905):

> Intent is . . . essential to such an attempt [to monopolize]. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of

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> nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen .... But when that intent and the consequent dangerous probability exists, [section 2] ... directs itself against that dangerous probability as well as against the completed result.

(citation omitted). Although inquiry into whether Coca Cola had a reasonable probability of gaining a monopoly position was obviated by lack of evidence of specific

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intent in *Sulmeyer*, other authorities have addressed the point. While courts have often found market shares of ten percent or less inadequate to prove attempt, *see generally* Areeda & Turner III, ¶ 835(c) at 348–49; *Whitten v. Paddock Pool Builders*, 508 F.2d 547 (1st Cir. 1974) (three percent), *cert. denied*, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 297 (7th Cir. 1974) (three percent); *I. Haas Trucking Co. v. New York Fruit Auction Corp.*, 364 F.Supp. 868, 874–75 (S.D.N.Y.1973) (ten percent), market shares of twenty percent may raise attempt liability, depending on other characteristics of the market. Thus, in *Yoder Brothers*, 537 F.2d at 1368–69, we declined to find attempted monopolization in a case in which the defendant controlled 20 percent of the market but "[b]arriers to entry were low in the ornamental plant industry; conditions were highly competitive." *Compare United States v. Empire Gas Corp.*, 537 F.2d 296, 305–07 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 592 (1977) (showing a 47–50% market share alone not sufficient to show dangerous probability of success for attempt to monopolize claim); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982) (attempted monopolization found on the basis of anticompetitive conduct; company held 24% market share); *White & White, Inc. v. American Hospital Supply Corp.*, No. 79–633CA1 540 F.Supp. 951, (W.D.Mich.1982), *reported in* 42 Antitrust & Trade Reg. Rep. (BNA) No. 1062, at 884 (April 29, 1982) (purchasing agreement between a national manufacturer-distributor of medical-surgical supplies and group of hospitals found an unlawful attempt to monopolize in five of relevant markets; court applied 25% market share as minimum cutoff for attempt); *Lektro-Vend Corp. v. Vendo Corp.*, 403 F.Supp. 527, 533–34 (N.D.Ill.1975), *aff'd*, 545 F.2d 1050 (7th Cir. 1976), *rev'd on other grounds*, 433 U.S.

623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (company with 20% of market extracted broad noncompetition covenants; guilty of attempt to monopolize).[18]

[9] In this unusual case, the problem with Dimmitt's monopolization claim was not lack of evidence demonstrative of intent to monopolize but rather lack of structural evidence demonstrative of ability to do so. *Cf. Forro Precision, Inc. v. IBM Corp., supra* (plaintiff failed to prove either dangerously high market power or intent to monopolize). Evidence of CPC's specific intent to monopolize, unmistakeably set forth in the company's internal memoranda, was the only basis for the jury's monopolization verdict. The jury could not have found in favor of CPC on attempt because of absence of proof of specific intent to monopolize.[19] Nor could it have conceivably found absence of a dangerous probability of monopolization given their finding that CPC had achieved monopoly. The only conceivable explanation for the jury's verdict is that given by Areeda and Turner III, ¶ 830(e) at 335—namely that the jury saw the attempt offense as redundant and unnecessary given its finding of the more serious violation. Having found in effect the defendant guilty of murder, the jury thought it inappropriate to find him guilty of attempted murder as well. In light of what the jury did in this case, the only remedy consistent with justice is to remand for a new trial on Dimmitt's attempt claim pursuant to our authority under Fed.R.Civ.P. 50(d). 5A

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Moore's Federal Practice, ¶ 50.15 (2d ed. 1982).[20] At the new trial, the jury will be given the opportunity to determine whether, although CPC's relevant market shares were inadequate to constitute achieved monopoly power, they were, together with the other structural and conduct evidence, sufficient to constitute a dangerous probability of monopolization.[21]

REVERSED AND REMANDED.

ON SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

In view of the tone and content of Appellant's Suggestion for Rehearing En Banc, we direct its attention to Rule 50(d), Federal Rules of Civil Procedure and the comment thereon by the Advisory Committee on 1963 Amendments to Rules, reading in pertinent part as follows:

> Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n. o. v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had.

FOOTNOTES

1. 15 U.S.C. § 1 provides, inter alia:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.... Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of this Title shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $50,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 provides, inter alia:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor ....

2. The text of these interrogatories, along with the jury's answers to each, were as follows:

INTERROGATORY NO. I

(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC combined or conspired to fix prices in violation of Section 1 of the Sherman Act?

Answer: "Yes" or "No"

ANSWER: No

If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).

(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?

Answer: "Yes" or "No"

ANSWER: _____

(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?

Answer: "Yes" or "No"

ANSWER: _____

INTERROGATORY NO. II

(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC monopolized a relevant market in violation of Section 2 of the Sherman Act?

Answer: "Yes" or "No"

ANSWER: Yes

If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).

(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?

Answer: "Yes" or "No"

ANSWER: Yes

(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?

Answer: "Yes" or "No"

ANSWER: No

INTERROGATORY NO. III

(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC attempted to monopolize a relevant market in violation of Section 2 of the Sherman Act?

Answer: "Yes" or "No"

ANSWER: No

If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).

(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?

Answer: "Yes" or "No"

ANSWER: _____

(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?

Answer: "Yes" or "No"

ANSWER: _____

INTERROGATORY NO. IV

(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC combined or conspired to monopolize a relevant market in violation of Section 2 of the Sherman Act?

Answer: "Yes" or "No"

ANSWER: No

If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).

(b) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of Dimmitt Agri?

Answer: "Yes" or "No"

ANSWER: _____

(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?

Answer: "Yes" or "No"

ANSWER: _____

INTERROGATORY NO. V

(a) Do you find from a preponderance of the evidence that, during the relevant time period, the defendant CPC discriminated in prices in violation of Section 2(a) of the Robinson-Patman Act?

Answer: "Yes" or "No"

ANSWER: No

If you have answered (a) above "Yes," then answer (b) and (c); otherwise do not answer (b) and (c).

(b) Do you find from a preponderance of the evidence that such violation of CPC was

a proximate cause of injury or damage to the business or property of Dimmitt Agri?

Answer: "Yes" or "No"

ANSWER: _____

(c) Do you find from a preponderance of the evidence that such violation of CPC was a proximate cause of injury or damage to the business or property of DIMACO?

Answer: "Yes" or "No"

ANSWER: _____

If you have answered "Yes" to one or more Interrogatories Nos. I(b), II(b), III(b), IV(b), or V(b), then answer the following Interrogatory; otherwise, do not answer Interrogatory No. VI(a).

INTERROGATORY NO. VI(a)

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Dimmitt Agri for the damage to its business or property which you have found was proximately caused by conduct of defendant in violation of the antitrust laws.

ANSWER IN DOLLARS AND CENTS, IF ANY:

$1,500,000.00

If you have answered "Yes" to one or more Interrogatories Nos. I(c), II(c), III(c), IV(c), or V(c), then answer the following Interrogatory; otherwise, do not answer Interrogatory No. VI(b).

INTERROGATORY NO. VI(b)

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate DIMACO for the damage to its business or property which you have found was proximately caused by conduct of defendant in violation of the antitrust laws.

ANSWER IN DOLLARS AND CENTS, IF ANY:

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3. Thus, the New York district court noted that at a low point in the defendant's control, the "percentage of total glucose production, domestic and foreign, attributable to the defendant Corn Products Refining Company" was, in 1913, only 57% and, in 1914, 53%. 234 F. at 974. The defendant's percentage of grape sugar was over 90% in 1914, and its share of starch production was 58% in 1914. *Id.* at 975.

4. Yet Dimmitt accomplished this more than once over the course of trial, especially during its cross-examination of Eiszner, the president of CPC. To cite but one example:

> Q .... You had the policy to conduct your marketing strategy in order to prevent the construction of new plants; is that right?
> A Construction or expansion of new plants, sir.
> Q Right?
> A We did not want new plants built before we could sell our capacity, sir; yes, sir.
> Q Right. And South Carolina was one of those that you wanted to prevent?
> A I would just as soon it didn't go ahead, sir. I don't deny that.

5. Some cases in the Ninth Circuit have, however, questioned the requirement of proof of relevant market in attempt cases. Annot., 27 A.L.R.Fed. at 768; *see, e.g., Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045, 1059 (9th Cir. 1982); *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964).

6. To some extent, *Corn Products* reflects this approach.

7. Thus, a basic antitrust hornbook states:

> Justice White asked few instrumental questions [in *Standard Oil v. United States*]; his inquiry was sharply focused on whether power over price existed and was being exercised. It did not matter to him that the share of the crude market controlled by the combination was exceedingly small, since it appeared that power over crude prices was exceedingly large. Today, with elaborate theoretical tools for analyzing power, courts have developed a set of instrumental issues. They ask not the ultimate question, does the firm have power?, but a series of subsidiary ones like, what market does the firm engage in?, what is its share of that market?, are there entry barriers?, and the like. These instrumental inquiries are of true worth only in such degree as they throw light on the ultimate issue. Sometimes, however, they get in the way. They are allowed to block off appropriate responses toward which a more direct concern with power, such as that shown in *Standard Oil*, would lead.
>
> ....

> Market definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether power exists
> ....
>
> Sullivan, *Antitrust* at 38, 41 (1977).

8. In *Spectrofuge*, 575 F.2d at 286, we held that:

> [T]here was insufficient evidence to support the jury's implicit finding that Beckman monopolized or attempted to monopolize a market comprised of the servicing of Beckman's scientific instruments or the submarket comprised of servicing its ultra-centrifuges. There was simply no evidence from which the jury could begin to measure Beckman's power to control prices or to exclude competition in the relevant market defined by Specterfuge.

9. The minutes from the industrial council gave the following information on CPC's market shares:

> Starch Market share goal: 25%
> Present market share: 21% (September 1971)
> Historical market share: 27%
> Corn syrup Market share goal: 17–18%
> Present market share: 16%

At trial, Eiszner testified that in 1970 CPC's share of the market for mill-grade cornstarch was between 21 and 25 percent and that the figure for 1971 was in the same range, but he believed it was lower than in 1970. Eiszner estimated that in 1972 CPC's share of the mill-grade cornstarch market was "back up to about 25%." With respect to syrup, Eiszner testified that according to his best estimates CPC's market share was between 16½ and 17 percent in 1970, between 15½ and 16½ percent in 1971, and "around 14%" in 1972. Finally, Eiszner testified that since 1971 CPC's share of the national corn syrup market had dropped and had never reached 18 percent.

After review of the trial record, we agree with appellant's statements that CPC's maximum possible market shares in the narrowest markets alleged by Dimmitt, consistent with the evidence, were: 25% in the national cornstarch market and 17% in the national corn syrup market.

10. A similar question was raised but never re-

solved in *Fulton v. Hecht*, 580 F.2d 1243, 1246–47 (5th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1789, 60 L.Ed.2d 241 (1979), where the plaintiff alleged that defendant had a monopoly over the South Florida greyhound racing industry. The defendant controlled 25% of this market, "since it shares the South Florida dog track market with three other tracks which are, generally speaking, allocated an equal number of racing days per year." *Id.* at 1246. As in this case, the plaintiff argued that "market share is not the determinative factor in assaying the existence of monopoly power" and that "the sterile percentage of market approach should not be applied to the South Florida greyhound racing industry." *Id.* Plaintiff noted that:

> Although each track may have only 25 percent of the market, the fact that only one track is operating at any given time makes each track's power significantly greater than that of a firm whose sales represent 25 percent of the normal market. According to plaintiff, the economies of this industry are such that a dog owner must be able to race year round in order to be competitive. Ignoring the Broward County track for the moment, plaintiff contends that each track has absolute monopoly power during the three months of the year when it is the only track in operation. Thus, each track can dictate the terms of booking contracts.

Id. In the end, we had no need to resolve the issue presented, since the plaintiff "did not present any evidence that [defendant] used its power to enhance or maintain its position." *Id.* at 1247.

11. The following are Supreme Court cases upholding a finding of monopolization, with the defendants' percentage of relevant market indicated: *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (91%); *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) (87%); *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959) (81%); *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911) (86%); *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911) (90%); *United*

States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), *adopted and approved*, *American Tobacco Co. v. United States*, 328 U.S. 781, 811–14, 66 S.Ct. 1125, 1139–41, 90 L.Ed. 1575 (1946) (90%); *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass.1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954) (75%); *United States v. Pullman Co.*, 50 F.Supp. 123 (E.D.Pa. 1943), *aff'd per curiam*, 330 U.S. 806, 67 S.Ct. 1078, 91 L.Ed. 1263 (1947) (100%). Indeed, former Assistant Attorney General Turner, head of the antitrust division, testified some time ago before a congressional committee that: "Section 2 refers to monopolies but not to oligopolies, and it has never been found to cover a monopoly in an industry in which the leading firm accounts for less than 70 percent of the market." *Status and Future of Small Business, 1967: Hearings Before the Senate Select Comm. on Small Business*, 90th Cong., 1st Sess. 714 (1967), *quoted in Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969).

12. Neither can Dimmitt draw support from our recent authorities upholding monopolization claims (references are to defendants' market shares): *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1352 & n.18 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1982) ("approximately 50%"); *Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964, 981 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978) (between 71 and 76%); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1307 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (90%); *North Texas Producers Ass'n v. Metzger Dairies, Inc.*, 348 F.2d 189, 194 (5th Cir. 1965), *cert. denied*, 382 U.S. 977, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) (between 85 and 90%); *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F.Supp. 780, 790–91 (S.D.Tex.1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973) (85%).

Even the relatively low market share (50%) in *Page Airways* is deceptive. The relevant market in that case involved sales of electronic equipment and interior furnishings for an extremely differentiated product—a Grumman

Gulfstream II ("G–II") airplane. On the question of monopoly power, we stated:

> Defendants argue that they could not be found guilty of monopolizing as a matter of law, since their market power was insufficient to support such a charge.... To be sure, Page's market power did not rise to the level existing in some cases that find actual monopolization. However, when Page's market share is viewed alongside the evidence of the number of actual competitors, the high barriers to entry, the limited number of G–II's remaining at the time of the trial to be produced, and Page's power over price, we believe the court below correctly submitted the issue to the jury.

624 F.2d at 1356–57 (citations omitted). The sale of even a single additional aircraft could have significantly varied Page's market share. As the Sixth Circuit concluded in *Borden, Inc. v. FTC*, 674 F.2d 498, 512 (6th Cir. 1982):

> When a seller possesses an overwhelmingly dominant share of the market, however, and differentiates its product from others through a recognized and extensively advertised brand name, thereby enabling the seller to control prices or unreasonably restrict competition, then monopoly power may be found to exist. Here Dimmitt did not dispute that fungible, undifferentiated products were involved.

13. Thus, Areeda and Turner conclude:

> (1) The monopolization offense depends upon proof that substantial market power was (a) possessed by the defendant at the time of his exclusionary conduct, (b) achieved as a result of such conduct, or (c) threatened to be achieved by that conduct....
>
> (2) We reject the arguments that the monopolization offense can be established for firms without such power solely on the basis of undesirable, or even of significantly anticompetitive, behavior. In particular, (a) power within a reasonably defined market is required, and (b) any refined effort to base the monopolization finding on an inverse "sliding scale" that varies the power component of the monopolization offense with the "invidiousness" of the conduct is doomed to failure. Yet, more gross versions of a sliding

> scale approach are inevitably involved in dealing with conduct on the road to monopoly ... and conduct that threatens but does not achieve monopoly power....
>
> Areeda & Turner, *III Antitrust Law* ¶ 810 at 296 (1978) (hereinafter cited as Areeda & Turner III).

14. The authors' list of instances in which conduct might be taken as sufficient proof of power includes tying arrangements, such as in *United States v. Loew's*, 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); *Northern Pacific R.R. Co. v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958), and practices illegal per se, such as horizontal price-fixing and market-sharing arrangements, as in *United States v. Socony-Vaccuum Oil Co.*, 310 U.S. 150, 224 n.59, 60 S.Ct. 811, 844 n.59, 84 L.Ed. 1129 (1940).

15. Dimmitt's graph suggests that CPC's list prices for corn syrup, for example, were the first down and the last up, belying CPC's claim that it was merely following competitors' price decreases.

16. Thus, Hoyt's market data, *supra* slip op. at 3268–3269, at —— drafted when CPC was not the sole defendant, notes that "the corn wet milling industry is *highly concentrated* with *five firms* accounting for over 71% of industry capacity" and that low product prices were "caused by the predatory pricing practices of the Defendants." (emphasis added). The jury, however, found Dimmitt's evidence insufficient to prove either a price-fixing conspiracy under section 1, Sherman Act, or a conspiracy to monopolize under section 2.

17. Appellant does not claim error in the jury instructions. The jury's charge on § 2 reads, in pertinent part:

> *The relevant time period* means the period of time from December 1970 through January 1973 in which the Dimmitt corn wet milling plant was operated by plaintiffs. Evidence concerning occurrences before and after that period may be considered insofar as it bears on occurrences during the relevant time period.
>
> ....

Specific intent to monopolize means the specific intent of defendant to control prices or to exclude competition in a relevant market.

The following instructions pertain to specific antitrust violations alleged by plaintiffs.

II, III, AND IV

MONOPOLIZATION, ATTEMPT TO MONOPOLIZE, AND CONSPIRACY TO MONOPOLIZE

Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States ... shall be deemed [to have violated the law] ....

Three separate offenses are included within Section 2 of the Sherman Act: (1) monopolization; (2) attempt to monopolize; and (3) combination or conspiracy to monopolize. You are to consider separately the facts with regard to each alleged offense.

Monopolization and attempted monopolization are violations which are committed by a single person acting independently rather than through joint action with some other person. A conspiracy to monopolize requires joint action by two or more persons.

In considering whether defendant has violated Section 2 of the Sherman Act, you must first determine the relevant market, that is, the line of commerce which defendant has allegedly monopolized, attempted to monopolize, or conspired to monopolize. The relevant market consists of two parts: the geographic market and the product market. In other words, in order to identify a relevant market, you must consider the questions of what products are involved and where those products are sold.

The relevant geographic market is the United States.

The relevant product market is that market in which there is effective competition in the sale and distribution of particular commodities and persons actually do, or potentially may, compete in the conduct of their business operations. The market includes other products which may be substitutes for the product in question, if any such substitutes exist and if they are actually competitive

with the products within the market.

The plaintiffs claim that there is a separate relevant product market consisting of the production and sale of cornstarch. Defendant contends that other products, such as tapioca starch and wheat starch, compete with corn starch and should be included within the same relevant product market. Plaintiffs also claim that there is a relevant product market consisting of the production and sale of corn syrup. Defendant contends that other products, such as dextrose, levulose (high fructose corn syrup), and sugar are substitutes for corn syrup, at least for certain customers.

Therefore, the Court instructs you that if plaintiffs fail to prove the existence of at least one of their claimed relevant product markets, then you may not find that defendant monopolized, attempted to monopolize, or conspired to monopolize trade in violation of Section 2 of the Sherman Act.

II

MONOPOLIZATION

Plaintiffs claim that defendant CPC has monopolized the relevant markets of corn starch and corn syrup in the United States, in violation of Section 2 of the Sherman Act.

The term "monopolize" means either to obtain or to maintain the power to control prices or exclude competition from a relevant market.

To find monopolization, it must appear that during the relevant time period:

(1) defendant possessed the power to stabilize or control prices or exclude competition;

(2) defendant knowingly and wilfully obtained, or maintained, the power to control prices or exclude competition from the relevant market of corn starch or corn syrup, or both; and

(3) defendant had the intent to exercise that power at that time.

Monopolization may be found to exist whenever it appears from a preponderance of the evidence that the three essential facts or conditions just stated have in fact occurred. It is not necessary that competitors actually be removed or excluded from the field before monopolization can be found.

III

ATTEMPT TO MONOPOLIZE

> Plaintiffs claim that defendant CPC has attempted to monopolize the relevant markets of corn starch and corn syrup in the United States, in violation of Section 2 of the Sherman Act.
>
> The term "attempt to monopolize" involves two essential elements: (1) a specific intent to monopolize, and (2) some predatory or anticompetitive act done in furtherance of that intent, even though insufficient actually to produce the intended monopolization. In order to find an attempt to monopolize, both elements—the intent and the act—must appear, and must together result in a dangerous probability that monopolization will sooner or later occur.

(emphasis in original).

18. Relative to market share requisites for the completed monopolization offense, minimum market shares for the attempt offense are much more unsettled. We have already cautioned courts to be wary of the "numbers game of market percentage" when considering attempts. *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969). *Compare* Areeda & Turner III, ¶ 835 at 350 (advancing some tentative, possibly "illusory" rules of thumb on minimum market shares for the attempt offense).

    Neither is the requisite of proof of dangerous probability of monopolization as secure as it once was. The Ninth Circuit has departed altogether from the rule, relying entirely on proof of specific intent to monopolize. *See, e.g., Forro Precision, Inc. v. IBM Corp., supra.* Areeda & Turner would adopt a "limited per se" rule for attempt in cases involving "per se" illegal conduct, *e.g.*, fraudulent procurements of invalid patents (as in *Walker Process Equipment v. Food Machines & Chemical Corp.*, 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965)) and predatory pricing. Areeda & Turner III, ¶ 836 at 352–55.

19. It is, of course, well established that price cutting as a tool to eliminate competition may violate § 2. *See, e.g., Corn Products.* And even CPC admits in its appellate brief that the memoranda evidence presented by Dimmitt "if accepted at face value, might be relevant to show an intent to monopolize in an attempt case under section 2 . . . ."

20. Note that we are not saying that all monopolization offenses must necessarily involve an attempt offense. They may well be cases in which a plaintiff succeeds in demonstrating a general intent to monopolize for the completed monopolization claim but fails to prove overt acts demonstrative of specific intent sufficient to carry an attempt claim. This case, however, is not one of those.

21. We reserve for another day one question raised by the litigants—whether proof of market power is unnecessary when the antitrust plaintiff demonstrates predatory pricing. There are authorities that would regard this as analogous to a "per se" attempt offense. *See, e.g., Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir.), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978) (proof of predatory conduct can in some circumstances permit inferences of specific intent and dangerous probability of success); Areeda & Turner III, ¶ 836(b) at 352–55. At trial Dimmitt attempted to prove that CPC dumped its cornstarch and corn syrup prices below both its total and average variable costs for sustained periods. The issue of whether the plaintiff here demonstrated predatory pricing by CPC, joined with the troubling question of whether there are categories of conduct—such as predatory pricing—that constitute unlawful § 2 attempts with little or no proof of defendant's market power may be the subject of a second appeal in this case. They are questions that, at the outset, should be resolved by the trial court on remand. We find, with some relief, that they are at present not ripe for our review.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 80-2065

D. C. Docket No. CA 2 74 144
(Consolidated in D. C. with CA 2 75 41)
DIMMITT AGRI INDUSTRIES, INC.,
a Texas Corporation,
Plaintiff-Appellee,

VERSUS

CPC INTERNATIONAL, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

Before GEE, RUBIN and GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant the costs on appeal to be taxed by the Clerk of this Court.

July 2, 1982

Issued as Mandate:

APPENDIX C

DIMMITT AGRI INDUSTRIES, INC., a
200 Texas Corporation, Plaintiff-Appellee,

v.

CPC INTERNATIONAL, INC.,
Defendant-Appellant.

No. 80-2065.

United States Court of Appeals,
Fifth Circuit.

Oct. 12, 1982.

Appeal from the United States District Court for the Northern District of Texas.

ON SUGGESTION FOR REHEARING EN BANC

679 F.2d 516 (5th Cir., 1982).

Before GEE, RUBIN and GARZA, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

In view of the tone and content of Appellant's Suggestion for Rehearing En Banc, we direct its attention to Rule 50(d), Federal Rules of Civil Procedure and the comment thereon by the Advisory Committee

on 1963 Amendments to Rules, reading in pertinent part as follows:

> Subdivision (d) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had.

APPENDIX D

LIST OF SUBSIDIARIES OF CPC INTERNATIONAL INC. PURSUANT TO RULE 28.1

CPC International Inc. ("CPC") has a number of subsidiaries whose stock it wholly owns. In addition, the following list shows the names of companies whose stock is partially owned by CPC.

The Canada Starch Company Limited
Societe des Produits du Mais S.A.
Adler Allgau GmbH
Fabbriche Riunite Amido Glucosio Destrina S.p.A.
CPC Kenya Limited
CPC Industrial Products (Kenya) Ltd.
Robertsons (Proprietary) Limited
Quelac S.A.I.C.A.
Triangulo Publicidad S.R.L.
Alimentos y Products de Maiz, S.A.
Corn Products — Fielders Pty. Limited
Rafhan Maize Products Company Ltd.
Monterey Farms Corporation
Pekin Energy Company
Hopewell International Company Ltd.
United Insurance Company
Corn Products Co. (India) Ltd.
Nihon Shokukin Kako Co. Ltd.
Knorr Shokukin Kabushiki Kaisha
Knorr Korea Ltd.
Shonan Yokei K.K.
Consolidated Starches (Pty.) Ltd.
Mais-Monda N.V./S.A.
Maizena Verwaltungsgesellschast fur Industrieanlagen GmbH

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were sent by United States mail, first-class postage prepaid, to the following counsel of record for Respondent, Dimmitt Agri Industries, Inc., this 13th day of January, 1983.

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.....

ROBERT J. MALINAK

No. 82-1169

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CPC INTERNATIONAL INC.,
Petitioner

VS.

DIMMITT AGRI INDUSTRIES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Court of Appeals empowered to remand this case to the District Court for a new trial on the attempt to monopolize claim upon its finding that such a remand was the only remedy consistent with justice?

2. Does the remand issued by the Court of Appeals for a new trial on the attempt to monopolize claim deprive CPC of any right guaranteed to it under the Seventh Amendment to the United States Constitution?

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No. 82-1169

In the Supreme Court

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OCTOBER TERM, 1982

CPC INTERNATIONAL INC.,
Petitioner

VS.

DIMMITT AGRI INDUSTRIES, INC.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

The instant petition for certiorari represents a frontal attack on the power of this Court and other Courts of Appeals to correct injustice, and unwarrantedly questions the constitutionality of new trials ordered pursuant to Rule 50(d) of the Federal Rules of Civil Procedure. The petition fails to satisfy any of the criteria enumerated in Rule 17 of the Rules of this Court and is without merit. Accordingly, and under well-settled doctrines pertinent to those circumstances under which review by certiorari is appropriate, the Court ought not to in this instance allow issuance of its writ.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 28 U.S.C. § 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

2. Rule 50(d) of the Federal Rules of Civil Procedure provides:

> "If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted."

3. The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

Respondent obtained a jury verdict against CPC on a claim that CPC had monopolized interstate trade in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The jury at the same time, and after having found monopolization, answered a special interrogatory, finding that CPC had not attempted to monopolize a relevant market in violation of Section 2 of the Sherman Act.

CPC moved the District Court for judgment notwithstanding the jury verdict. The District Court denied the motion for judgment n.o.v. and, on August 29, 1980, entered judgment on the jury verdict in favor of respondent. CPC appealed from the verdict and judgment.

On July 2, 1982, the Fifth Circuit Court of Appeals reversed the District Court's judgment on respondent's monopolization claim and, pursuant to F.R.Civ.P. Rule 50(d) and its inherent power to correct manifest injustice, remanded the case to the District Court for a new trial on respondent's attempt to monopolize claim, finding that to be "the only remedy consistent with justice" 679 F.2d 516, 533.

REASONS FOR DENYING THE WRIT

The ruling of the Court of Appeals is entirely consistent with the uniform holdings of this and other Courts that a Federal Court of Appeals has the power to order a new trial on its own motion and in avoidance of manifest injustice. In this case, respondent specifically requested a new trial "should the Court of Appeals consider reversing the District Court's judgment entered on respondent's monopolization claim. [*Brief of Appellee*, p. 2]. CPC was

afforded a full and adequate opportunity to address, brief and argue the propriety of respondent's request for a new trial. No procedural impropriety was committed on this point, and the Court of Appeals acted well within its power and discretion in ordering that a new trial go forward. Indeed, even had respondent not suggested the appropriateness of a new trial, the Court of Appeals was, given the fact that the District Court's judgment was lawfully before it for review, fully empowered to order a new trial on the attempt to monopolize claim. Finally, the order granting a new trial does not "reverse" the jury verdict in this case, and cannot be characterized as an unconstitutional or otherwise impermissible re-examination of the jury's verdict.

A. The Court of Appeals Below was Clearly Empowered to Remand the Case for a New Trial on the Attempt to Monopolize Claim

Contrary to the suggestion made by CPC, the entire judgment entered by the District Court was before the Fifth Circuit on appeal. The fact that respondent did not file a formal cross-appeal from the jury finding on the attempt to monopolize claim did not deprive the Court of Appeals of its power to both consider the propriety of and order a new trial on that claim. As stated by Professor Wright:

> "Occasional statements may be found that the absence of a required appeal deprives the court of jurisdiction to consider the questions that should have been so raised, or even that the appellee lacks 'standing' to raise questions not framed by cross-appeal. The predominant view, however, is that in appropriate circumstances the requirement can be ignored. This view

finds some support in Supreme Court practice, and surrounding statements that appear to embrace appeals to courts of appeals.

"It seems better to recognize a power to modify a judgment in favor of a nonappealing party. This view is easiest to justify with respect to matters going to jurisdiction, or any other matters so important that a court is justified in raising them on its own motion. Even with respect to issues raised by an appellee, there may not be a great interest in fostering the appellant's sense of repose in whatever partial victory seems assured by the lack of formal cross-appeal. More important, there seems to be little functional justification for the cross-appeal requirement. . . . Recognition of a *power*, finally, need not lead to its profligate use. In one recent opinion, the Court of Appeals for the Second Circuit stated that if an issue were before it, there would be no difficulty in finding error; that the cross-appeal requirement may well be a rule of practice that may be disregarded; but that there was no sufficient reason to disregard it in the circumstances presented. Such restrained use of the power may provide justice in particularly worthy cases without disrupting the normal flow of appellate business or the important expectations of the parties.

"The power to modify a judgment adversely to the appellant, without a cross-appeal, has been expanded to allow reversal even in favor of parties who did not participate at all in the appeal." [footnotes omitted][1]

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[1]15 C. Wright, A. Miller, & Cooper & E. Gressman, Federal Practice and Procedure § 3904, at 416-418.

Professor Moore's treatise on federal practice is, on this point of appellate power, entirely in agreement with the view espoused by Professor Wright:

> "The principle . . . that a judgment will not be set aside or altered on appeal in favor of a person who has not filed a timely notice of appeal, whether an appellee or a co-party of the appellant . . . is clearly *not required* by the provisions of Article III or [28 U.S.C.] § 1291, however, since both these provisions, as interpreted, deal with whole cases."[2]

In *Langes v. Green*, 282 U.S. 531 (1931), this Court specifically observed that none of the cases dealing with the scope of appellate review:

> "[D]enying the *power* of the Court to review objections urged by respondent, although he has *not* applied for certiorari, if the Court deems there is good reason to do so." *id* 538[3]

A federal Court of Appeals clearly has the power to itself modify a judgment of a District Court lawfully before it *without* reversing or remanding the case to the District Court *Gladney v. Review Committee*, 257 F.Supp.

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[2]9 J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶ 204.11[5], at 4-56 to 4-57 (2d Ed. 1982). The 1937 decision of this Court in *Morley Const. Co. v. Maryland Casualty Co.*, 300 U.S. 185 is not to the contrary. In *Morley* Justice Cardozo speaks in terms of the *rights* of litigants as distinguished from the *power* of appellate courts *id* 190-192. Neither does this Court in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) do anything other than, for reasons sufficient unto it, decline to *exercise its power* to review and consider matters not raised in the petition for certiorari.

[3]*See also: Bryant v. Technical Research Co.*, 654 F.2d 1337 (9th Cir.) 1981; *Scott v. University of Delaware*, 601 F.2d 76, 82-83 (3rd Cir.) 1979.

57; *aff'd* 380 F.2d 929; *cert. den.* 389 U.S. 1036. Indeed, Appellate Courts have both the power and the duty to reverse judgments and order new trials where, as here, a manifest miscarriage of justice has plainly occurred. *Knight v. United States,* 213 F.2d 699 (5th Cir.) 1954.

B. The Remand Issued By The Court Of Appeals For A New Trial On The Attempt To Monopolize Claim Does Not Deprive CPC Of Any Right Guaranteed To It Under The Seventh Amendment To The United States Constitution

CPC appears to assert that in ordering a new trial the Court of Appeals impermissably re-examined some fact or facts determined by the jury in a manner which does not comport with the Seventh Amendment. The Court of Appeals did no such thing.

The power of Courts to order new trials in appropriate cases is one which existed at common law[4] at the time our Constitution was adopted and ratified, *National Car Rental System Inc. v. Better Monkey Grip Co.,* 511 F.2d 724 (5th Cir.) 1975. There is no authority for a contention that Courts of Appeals presently suffer any absence of jurisdiction in this regard, nor is there any authority for CPC's assertion that the action taken by the Fifth Circuit was in any way improper or impermissable. In fact, the authority relied upon by CPC, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355 (1962), doesn't even deal with the granting of a new trial.

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[4]11 C. Wright & A. Miller, Federal Practice & Procedure, § 2801 at 27-35 [1971]; 9 C. Wright & A. Miller, Federal Practice & Procedure, § 2531 at 575-578 [1971]; *and see Gasoline Products Co. v. Champlin Refining Co.,* 283 U.S. 494 (1931).

After first discussing generally the reasons for and constitutionality[5] of a power vested in Federal Courts to grant new trials and partial new trials, Professor Moore speaks to the power of Courts of Appeals to order new trials thusly:

> "Whether an appellate court should grant a new trial as to all or only some of the parties is a matter resting within its discretion. Similarly, it has a large discretion to grant a new trial as to all the issues, or a partial new trial. If the issues are interwoven, then a new trial as to all of the issues should be ordered. On the other hand if the error below did not extend to the whole judgment but only to a particular issue(s) and this is sufficiently separate so that a fair trial may be had as to it alone, the appellate court may grant a partial new trial limited to such separate issue." (footnotes omitted)[6]

The power of the Court of Appeals to remand for a new trial is in no way dependent upon the exercise or non-exercise by the District Court of its power to grant a new trial under Rule 59 of the Federal Rules of Civil Procedure, and CPC cites no authority in support of this proposition. Nor does CPC provide any authority for its assertion that "a Court of Appeals may not *sua sponte* reverse a jury finding that has not been appealed unless such action is unavoidably necessary to the Court's determination of the matter on appeal." [*Petition*, p. 10].

Firstly, the "matter on appeal" was the judgment entered by the District Court, and the entire judgment was lawfully before the Fifth Circuit. CPC's attempt, made elsewhere, to substitute the term "issues" for the statutory

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[5]See: 6A J. Moore, B. Ward & J. Lucas, Moore's Federal Practice ¶¶ 59.05-59.06 (2d Ed. 1982).

[6]*Id*, ¶ 59.06 at 59-64—59-67.

terms included in 28 U.S.C. § 2106 *viz*, "judgment, decree or order" is improper and ought to be summarily rejected.[1] Secondly, and more importantly, the argument made by CPC is defeated by the plain language of both 28 U.S.C. 2106 and F.R.Civ.P., Rule 50(d). Lastly on this point, the Court of Appeals remand for a new trial does not "reverse" any finding made by the jury. Were it otherwise, respondent could and would simply apply to the District Court for entry of a judgment in its favor on the attempt to monopolize claim, without the necessity for a new trial and a new jury determination on that claim. In the instant case, a new trial is plainly required to, among other things, address and cure the erroneous evidentiary exclusions that attended upon the first trial, and upon which the jury verdict was based [*Brief of Appellee*, p. 2; 679 F.2d 516, 527].

CPC's discussion of the "differences between the intent and power requirements for the monopolization and attempt to monopolize offenses" [*Petition*, pp. 12-16] is pure obfuscation. Neither it nor the wholly argumentative evidentiary review contained in CPC's "statement of the case" need be addressed, since neither are pertinent to the questions presented on the instant petition, and both constitute legal sophistry of the highest order. Respondent does reject the notion that the jury could not have found that CPC both attempted to monopolize and monopolized during the time period relevant to this case.

The fact is that Courts of Appeals plainly and properly possess both statutory and inherent power to order new trials on their own motion, and nothing recited by CPC

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[1] *See:* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia Law Review, 527, 543-544 (1947).

demonstrates or even supports the contrary proposition. The Fifth Circuit clearly had the power to remand this case for a new trial on the attempt to monopolize claim, and it would have been a clear abuse of its discretion not to have done so.

CPC fails to demonstrate any impermissible re-examination or reversal of the jury's verdict in this case. The Fifth Circuit Court of Appeals Order of Remand was well within its power and within the exercise of its sound discretion, and is not properly subject to review or reversal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: February 8, 1983.

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